TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 686.

AMERICAN BANANA COMPANY, PLAINTIFF IN ERROR,

vs.

UNITED FRUIT COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 18, 1907.

(21,482.)

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United States Circuit Court,

1

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

UNITED FRUIT COMPANY,
Defendant.

2

UNITED STATES OF AMERICA, SS.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between the American Banana Company, plaintiff below and plaintiff in error, and the United Fruit Company, defendant below and defendant in error, a manifest error hath happened to the great damage of the said American Banana Company, as is said and appears by the petition and assignment of errors herein.

3

We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf,

command you if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, in the Post Office Building, Borough of Manhattan, City of New York, together with this writ, so that you have the same at the said place before the Judges aforesaid on the 17th day of April next; that the record and proceedings aforesaid being inspected, the said Judges of the Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of March, 1908.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 109 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of American Banana Company, plaintiff in error, against United Fruit Company, defendant in error, as the same remain of record and on file in said office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2d day of April, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-second. 7

JOHN A. SHIELDS,
Clerk.

[SEAL.]

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK. 8

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

UNITED FRUIT COMPANY,
Defendant.

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK: 9

The American Banana Company, plaintiff in the above-entitled cause, feeling itself aggrieved by the judgment entered herein on the 27th day of March, 1908, comes now, by Wheeler, Cortis & Haight, its attorneys, and petitions this Court to allow said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Second Circuit, according to the laws of the United States in that behalf made and provided, and also that an order be made that upon the giving of security for

10 the prosecution of said writ of error, in accordance with the rules of this Court, all further proceedings herein in this Court be suspended until the determination of the writ of error by the United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

WHEELER, CORTIS & HAIGHT.

(Endorsed)—United States Circuit Court, Southern District of N. Y.—American Banana Company, Plaintiff, against United Fruit Company, Defendant.—Petition and Writ of Error. —Wheeler, Cortis & Haight, Attorneys for
11 Plaintiff, 21 State Street, New York City, N. Y.—Service of a copy of the within Writ of Error is hereby admitted this 28th day of March, 1908. Strong & Cadwalader, Attorneys for deft.—United States Circuit Court, Southern Dist. N. Y.—Mar. 28, 1908.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

12

AMERICAN BANANA COMPANY

AGAINST

UNITED FRUIT COMPANY.

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty

days after the service of this summons, exclusive 13
of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 12th day of September, in the year one thousand nine hundred and six.

JOHN A. SHIELDS,
[L. S.] Clerk.

WHEELER, CORTIS & HAIGHT,
Plaintiff's Attorneys, 14
Office and Post Office Address,
21 State St.,
Borough of Manhattan,
New York City.

(Endorsed)—United States Circuit Court, Southern District of New York.—American Banana Company *vs.* United Fruit Company.—Summons.—Wheeler, Cortis & Haight, Plaintiff's Attorneys.—To the Defendant within named: Take Notice, That upon default judgment will be taken for the sum of six million dollars, in money, with interest of , 190 , be- 15
sides costs and attorney's fee. Wheeler, Cortis & Haight, Plaintiff's Attorneys.—U. S. Circuit Court, Southern District of New York.—Filed Sep. 17, 1906.—John A. Shields, Clerk.

16 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY AGAINST UNITED FRUIT COMPANY.	At Law.

The plaintiff American Banana Company, complaining of the United Fruit Company, the defend-
17 ant herein, alleges:

FIRST.—The above-named plaintiff, the American Banana Company, since about June 18, 1904, has been and still is a corporation duly organized and existing under the laws of the State of Alabama, and a citizen of the State of Alabama—formed for the purpose of carrying on the business of buying and growing bananas in the Republics of Central America, and importing them into the United States, and there selling them, and for carrying on such other operations as might be incidental to said business.

18

SECOND.—The above-named defendant, United Fruit Company, at all the times hereinafter mentioned was and still is a citizen of the State of New Jersey, and a corporation organized and existing under the laws of the State of New Jersey, and at all the times hereinafter mentioned had and still has a regular office and place of business in the Southern district of New York, and during said times has been and is importing bananas into said district from foreign countries, upon steamers owned or chartered by it, and said defendant is at present found within said district.

THIRD.—Upon information and belief the United 19
Fruit Company was organized as a corporation on March 30, 1899, and was at all the times hereinafter mentioned, and now is engaged in importing bananas into various ports of the United States from the West Indies and Central and South America. Prior to the organization of the defendant the said United Fruit Company, the business of importing bananas from the West Indies and Central and South America into the United States was conducted by several persons and corporations, and such persons and corporations were actively competing one with another in said trade.

20

FOURTH.—The principal persons and corporations which were, prior to said last named date, engaged in the trade of importing bananas from the West Indies into the United States were the Boston Fruit Company and W. W. and C. R. Noyes, of Boston; E. Cuneo, J. M. Ceballos & Co., W. L. Rathbun & Co., Aspinwall Fruit Company, J. E. Kerr & Co., American Fruit Co. of New York, The West India Fruit Company and Quaker City Fruit Company of Philadelphia; the Monumental Fruit Co. and Buckman Fruit Co. of Baltimore and Henry Beyer & Son, of Charleston, South Carolina. Said persons and corporations sold the bananas so 21
imported principally in the Eastern States of the United States.

FIFTH.—The principal persons and corporations who, prior to said last-mentioned date, were engaged in the trade of importing bananas from Central and South America into the United States were, The New Orleans, Belize Royal Mail & Central America Steamship Co., Ltd., S. Oteri, John G. Woods, The Bluefields Steamship Co., The Camors-Weinberger Banana Company, Limited; J. B. Camors & Company and the Mobile Fruit &

22 Trading Co. (the two latter being subsequently united as the Camors-McConnell & Company), the Snyder Banana Co. and the Eureka Banana & Development Company. Said persons and corporations sold bananas so imported, principally in the Central, Western and Southern States of the United States. The Banes Fruit Company, The Dominican Fruit Company, The Sama Fruit Company, J. B. Cefalu & Brother, and the Columbia Land Company, Limited, were also connected with said business of importing bananas.

SIXTH.—The method in which the trade of im-
23 porting bananas into the United States was carried on by said persons and corporations during many years prior to said last-mentioned date, was for said importers to obtain cargoes from the West Indies, Central and South America partly from their own plantations, but largely by purchasing bananas from persons resident in the West Indies, South and Central America. There was great competition between the several parties engaged in the purchase of such fruit, and they were obliged, on account of such competitions, to pay fair and reasonable prices for the same.

SEVENTH.—The said United Fruit Company was
24 formed with a capital stock of twenty million dollars, of which at least eleven million were actually subscribed, and this subscription was subsequently increased to $15,783,000. For the purpose of controlling and monopolizing the trade of importing bananas into the United States, and to regulate the prices at which such fruit should be bought and sold, and to prevent competition in the purchase and sale of such fruit, The United Fruit Company, during the years of 1899 and 1900, and subsequent years, purchased the property and business of several of said competing individuals and companies,

and as a part of each of such purchase except in 25
cases where the seller became an officer of the defendant or was otherwise identified with it exacted the condition that those whose property and business was purchased should agree not to further engage in said trade.

EIGHTH.—Upon information and belief, this plaintiff alleges that the United Fruit Company so bought the property and business of the Belize Royal Mail & Central America Steamship Company, Limited, S. Oteri, John G. Woods, Snyder Banana Company, The Boston Fruit Company, American Fruit Company, Quaker City Fruit Com- 26
pany, Buckman Fruit Company, Banes Fruit Company, Dominican Fruit Company, Sama Fruit Company, Colombia Land Company, Limited, and in each case except in cases where the seller became an officer with the defendant, or was otherwise identified with it imposed the condition above mentioned. Said purchasers submitted to said condition and did severally agree not to further engage in said trade, whereby the competition aforesaid was extinguished. The said West India Fruit Company, the said Monumental Fruit Company and Bayer & Son have gone out of the fruit importing business and the said Eureka Banana & 27
Development Co. has failed and been bought up by the defendant.

NINTH.—Said defendant during the year 1899 and subsequent years, made and entered into contracts with many other said persons and corporations engaged in said business for the regulation of the quantity of bananas to be purchased and sold by each, and for the regulation of the price at which such fruit was to be purchased, and for the manner of selling the same, so as to prevent competition between said companies and the defend-

ant Company, or between themselves, in the prices at which such fruit was to be sold and so as to restrain and monopolize the said trade in such fruit and to give the defendant the control of their business, and they did thereby prevent such competition, and did restrain and monopolize the trade in said tropical fruit between Central America, South America and the West Indies on the one part and the United States of America on the other.

TENTH.—Upon information and belief this plaintiff alleges that the persons and corporations that entered into such contracts with the defendant were The Camors-Weinberger Banana Company, Limited, The Orr & Laubenheimer Company, J. M. Ceballos & Co. and the Bluefields Steamship Co.

ELEVENTH.—For the purpose of so regulating the sale of tropical fruit in the United States and monopolizing the trade therein and for the further carrying out of the contracts aforesaid the defendant thereafter caused to be organized a corporation under the name of the Fruit Dispatch Company, all of the capital stock of which was and still is held by the defendant. It was then agreed between the defendant and the individuals and the corporations so combining and agreeing with it as aforesaid, that all the bananas imported by them, or either of them, should be sold at fixed prices through the Fruit Dispatch Company, as the common agent of all of them. The purpose and effect of said contract was to give the defendant control of all sales of fruit belonging to those engaged in said contracts.

TWELFTH.—Upon information and belief, this defendant further alleges that there also exist some contracts between the defendant and each of the

following: J. B. Cefalu & Brother, The Central 31
American Steamship Company, Vaccaro Brothers & Company, The Thacker Bros. Steamship Co. of Mobile, the Atlantic Fruit Co. of Baltimore and others, of the same general nature to accomplish the same purpose, but the full terms of these are unknown to this plaintiff. The Northern Railway Co. of Costa Rica, a railroad company whose principal business is the carrying of bananas, is owned and controlled by the defendant herein. The companies above mentioned constitute the great majority of the important companies importing bananas into the United States and the four last mentioned have gone into the business since 1900. 32

THIRTEENTH.—After the defendant was organized and after the aforesaid contracts were made and in pursuance thereof, said defendant and these contracting with it as aforesaid entered upon an active and destructive competition with Camors, McConnell & Company, who were then engaged in the importation of bananas into the United States, and selling the same, principally in the southern, central and western States, as they were also doing and have always continued to do with such other independent importers of bananas as had not combined with the said defendant Company in its 33
endeavor to monopolize the trade in bananas as aforesaid, and by such competition caused Camors, McConnell & Company to conduct its business at a constant loss. After these losses had continued for some time, the defendant, through its representatives, proposed to Camors, McConnell & Company, and to certain other parties to enter into an agreement which would make the business of Camors, McConnell & Company part of said combination, and to this end proposed to them the organization of a new corporation to be known as the Camors-McConnell Co. a majority of the stock of

which should be held by the defendant, and that the defendant should make and enter into agreements with them which would regulate and control the amount of bananas that said new corporation, the Camors-McConnell Company, should thereafter import, and the price at which bananas imported by either of said corporations should be purchased and sold, and should further provide that the parties to said agreement except the United Fruit Company should not engage in the business of importing or selling tropical fruits, or any other business directly or indirectly in competition with the new corporation, or with the United Fruit Company, except through the new corporation. Said proposition was accepted by said Camors, McConnell & Company.

FOURTEENTH.—Thereupon, and in performance of said agreement with defendant, two written contracts were simultaneously entered into on or about December 8th, 1899. One of these contracts was executed by Andrew W. Prenton, representing the defendant and by Herbert L. McConnell, Camors, McConnell & Company, Louis Weinberger, Krossmann, Braden & Co., R. Braden, J. B. Camors, Jacob Weinberger, V. Camors, Chas. Weinberger, J. W. Krossmann, Ernest Braden, John C. Dehls. It provided that one-half the shares of the Camors-McConnell Company, the corporation to be thus formed, should be transferred to Andrew W. Preston, who was and is one of the officers of the defendant Company, in trust to hold said stock for its benefit. Said agreement also provided that the said Preston should also receive and hold in trust in the same way one additional share of the capital stock of said Camors-McConnell Company, and and that he should thus control the majority of said stock and have power to elect three of the five directors of the new corporation, who were to gov-

ern the affairs of said corporation. Said share 37
was given him for that purpose only. Said agreement was duly performed and on the organization of the said Camors-McConnell Company the said stock transferred and the directors elected as aforesaid. Pursuant to said agreement the affairs of the Camors-McConnell Company have ever since been and still are governed and controlled by the defendant herein.

FIFTEENTH.—The second of the said contracts was made between the holders of all the stock of the Camors-McConnell Company, to wit, Andrew W. Preston, representing the defendant herein and 38
J. B. Camors, Herbert L. McConnell, Rudolph Braden and Louis Weinberger and was to continue for ten years. It limited the amount of fruit which the said Camors-McConnell Company could import into the United States, and restricted the importations of fruit to be made by the defendant and provided for further restrictions on imports of fruit into southern ports of the United States, and for the regulation of prices at which fruit should be obtained by the parties to said contract and sold in the United States. Said contracts ever since that time have been and still are carried out by the parties thereto in respect to all matters that 39
relate to the aforesaid contracts to restrain and monopolize said trade and have been acted upon and carried out by the Camors-McConnell Company.

SIXTEENTH.—Pursuant to said agreement with the defendant, a third contract between said Camors-McConnell Company and said Fruit Dispatch Company was drawn up on or about December 8th, 1899, and executed and delivered by them on or about January 27th, 1900, after the formation of the said Camors-McConnell Company. By said contract the said Fruit Dispatch Com-

40 pany was appointed the exclusive selling agent of said Camors-McConnell Company, which it ever since has been and still is. The purpose and effect of said contract was to give the defendant control of all sales of the fruit of said Camors-McConnell Company.

SEVENTEENTH.—The said defendant and the Camors- McConnell Company have since been conterms of said agreements and contracts in association with the other persons and corporations hereinbefore mentioned engaged in the importing of bananas into the United States, who had as afore-
41 said, entered into contracts with the defendant and the Fruit Dispatch Company similar to the said contracts between them and the Camors-McConnell Company and also in association with those persons mentioned in the twelfth article of the complaint herein, by which contracts the amount of such tropical fruit imported into the United States was regulated and the prices at which such fruit should be bought and sold as aforesaid were controlled, and said Fruit Dispatch Company was enabled to make and did make contracts with persons buying fruit throughout the United States for long periods of time, by
42 which said persons were forced to buy all their fruit from the said Fruit Dispatch Company and the effect of said contracts was that said Fruit Dispatch Company was enabled thereby to regulate prices in that market, and deprive any other importers of bananas that there might be from finding purchasers for their fruit.

SEVENTEENTH A.—From time to time between its organization and the commencement of this suit, defendant acquired a controlling interest in the stock of the following named corporations: Camors-Weinberger Banana Company, Orr-

Laubenheimer Company, Bluefields Steamship Company, Limited, Thacker Brothers Steamship Company, Atlantic Fruit Company, Boston Fruit Company and Colombia Land Company, Limited. The certificates of said stock showing such ownership were in different parcels and in the names of different persons. In most of such cases, said stock has stood, and at the time of the commencement of this action did stand, upon the books of said corporations in the names of some of the following persons: A. W. Preston, Minor C. Keith, W. B. Spencer, C. H. Ellis, M. J. Dempsey, Samuel Zemurray, P. J. Mones, J. P. Mones and W. H. Bennett. 43 44

Said corporations, before defendant acquired the control of them, had been respectively competing with defendant and each other in the business of buying and raising bananas in foreign countries and importing bananas into the United States and in selling the same in the United States.

"Defendant also, during said time, acquired the control of said corporations by procuring the election in each of their respective boards of directors of a majority of each of said boards of directors who should represent defendant. In most cases, such directors were officers or agents of defendant.

"The control so acquired was obtained by defendant as part of a combination and conspiracy to monopolize a part of the trade in bananas between the West Indies and Central America and the United States, and also between the various States comprising such United States which are situated east of the Rocky Mountains. After defendant acquired such control, from time to time the said corporations respectively ceased to compete with each other and with defendant in the business aforesaid. 45

EIGHTEENTH.—The said contracts, combinations and conspiracies enabled the defendant to main-

46 tain and it has thereby from time to time maintained and still does maintain at an excessive and unreasonable point the prices at which bananas were and are sold in the United States. It has thereby restricted the amount imported by itself and its allied companies. It has from time to time destroyed bananas which had been and which were about to be imported into the United States and which would otherwise have been sold in different parts of the United States. The object and effect of such destruction was to restrain the trade in bananas in the United States and to increase the price thereof to be paid by the consumers there-
47 of. When such fruit was so destroyed in the United States the invoiced cost of such fruit at the point from which it had been transported was paid out of the common fund contributed by the several parties connected together in said combinations and conspiracies under said contracts as aforesaid. When it was destroyed before shipment the loss was borne by the individual importer.

NINETEENTH.—On information and belief, that in the spring of 1904 the said defendant under the contracts aforesaid and in combination and conspiracy with the parties aforesaid in order to more fully monopolize the trade in tropical fruit between
48 Central America and the United States, attempted to induce and did induce the officails of the Republic of Panama, in violation of the statute of the United States in such case made and provided, to sign a contract of concession in favor of defendant granting to it exclusive shipping privileges in the Changuinola and in the Sixola districts which are districts in said Republic contiguous to each other and are favorable to the cultivation of bananas.

TWENTIETH.—Said defendant has in combination and conspiracy with other parties as aforesaid

during five years last past carried on an economic warfare against every company engaged in the same business and against this plaintiff since its organization and has sought by underselling such companies at competing points and by divers other methods, to force such competing companies to unite with the said defendant under contracts similar to those with said Camors-McConnell Company, or go out of business. 49

TWENTY-FIRST.—In or about the month of April, 1903, one Herbert L. McConnell began to make a banana plantation, and to plant bananas along the banks of the Sixola River, in Panama, and in the valley of said river in said Sixola district, as he lawfully might under the laws of the United States of Colombia, and to build a railway connecting said plantation with the nearest port, Gadooan, for the transportation of bananas thereto, so that they might thence be exported to the United States. 50

TWENTY-SECOND.—The officers of the defendant thereupon notified the said McConnell that he must either combine with them in their combination, which they had effected as aforesaid, or give up trading in bananas, and threatened that if he did not do so defendant would do everything it could to block and obstruct his said work and his said banana trade with the United States. 51

TWENTY-THIRD.—In or about the month of April, 1903, Governor Duran, of the Department of Panama, United States of Colombia, issued to one Romero a concession to build a railroad for the transportation of bananas from the River Sixola to Gandooan, and on May 1st, 1903, after Congress adjourned, he approved of a transfer of the same to the said McConnell. On information and belief that thereafter influence was brought to bear on

52 the said Governor Duran by the defendant, and without any justification, on June 25th, 1903, he wrote the National Government of the United States of Colombia recommending that Costa Rica be allowed to administer the territory through which said railroad was to run. There was no lawful reason why Colombia should surrender said territory to Costa Rica. The territory in question had been definitely awarded to Colombia on September 11th, 1900, by an award duly made, signed and delivered by the President of the French Republic, pursuant to a treaty theretofore made between the Republics of Colombia and Costa Rica,
53 which award, by the terms of said treaty, was to be final and conclusive upon both parties, and said territory was thereby declared a part of the territory of the United States of Colombia. Shortly thereafter, and as plaintiff is informed and believes, pursuant to a prior agreement with defendant, said Duran became attorney for defendant.

TWENTY-FOURTH.—Soon after the said McConnell began planting bananas, as aforesaid, in April, 1905, the defendant interfered with the said plantation and entered upon the land occupied by plaintiff, which had been laid out for planting bananas, and thereafter the Government of Costa Rica, at
54 the inducement of the defendant, as the plaintiff is informed and believes, sent soldiers or other officers there and interfered with him in his work in September, 1903. Through the good offices of the United States Government the said Government of Costa Rica ceased such interference in or about December, 1903.

TWENTY-FIFTH.—In November, 1903, that portion of the United States of Colombia known as the Department of Panama, in which portion said plantation is situated, revolted and became the Re-

public of Panama, and in its constitution, published February 15th, 1904, it declared its northern and eastern boundary to be that laid down by the President of France, hereinbefore referred to. 55

TWENTY-SIXTH.—In June, 1904, the plaintiff, as a part of its business aforesaid, purchased from said Herbert L. McConnell the said plantation and his said concession, and he conveyed the same to it, and it continued the development thereof and the construction of the said railway, and of a pier at the seaboard end thereof at Gadooan, and expended in the purchase and development of said plantation more than $480,000. The same McConnell became 56
President of this plaintiff at its organization, and continued so to be down to the first day of September, 1905, and has been since the plaintiff's organization, and still is a stockholder of the plaintiff.

TWENTY-SEVEN.—In July, 1904, plaintiff was in peaceable and undisturbed possession of its banana plantation and was building its railway and pier as under the laws of the Republic of Panama it had the right to do. Said plantation and railway were within the territorial limits of said Republic as fixed by its Constitution. The territorial inde- 57
pendence of said Republic had been guaranteed by the United States of America. Nevertheless, in said month of July, 1904, Costa Rican soldiers and officials were instigated and induced by said defendant company, as plaintiff is informed and believes, to seize, and they did in fact seize, the portion of the plantation of the plaintiff herein lying on the northerly side of the Sixola River, which flowed through said plantation, and a cargo of railroad and other supplies, which had been landed from a vessel chartered by the said McConnell for the plaintiff—the steamship *Orn*, under the super-

intendence of Panama Customs officials. On information and belief the defendant attempted to induce and did induce said soldiers and officials to hold, and they have held, said goods so landed, and occupied said northerly portion of the plantation of the plaintiff ever since; and to stop, and they have stopped, the construction and operation of the said plantation, railway, and the piers at said port of Gadocan, which afforded the only practicable mode of ingress to or egress from the said plantation, being the only port to which the plaintiff could bring supplies, or from which it could export the bananas grown on any part of said plantation, and they have prevented the importation of supplies for said plantation and railway and the export of bananas therefrom, and they hold said goods and plantation at the present time and prevent the plaintiff from carrying on the trade of exporting bananas and other tropical fruits from said plantation and district to the United States of America. The land to the south of said plantation and between it and the port of Bocas del Toro, in the Republic of Panama, is crossed by large rivers, and is in large part a dense swamp and jungle, and part of it belongs to defendant, and the construction of a railway through it from plaintiff's said plantation to said Bocas is and always has been impracticable.

TWENTY-EIGHTH.—In or about March, 1900, while the boundary line between the United States of Colombia and Costa Rica was in dispute, one Jose Astua Aguilar, his children and one or two others, began proceedings in Costa Rica, known as denouncement proceedings to acquire title to certain wild lands, part of which are claimed by the defendant herein to be the same as those belonging to and occupied by the plaintiff herein. By the

statute of Costa Rica passed April 1, 1896, and ever since in force, it is provided that: 61

> "All pending denouncements of national (wild) lands in which the parties denouncing or their representatives shall have allowed or shall allow six months to pass, counting from the date of the last notification without moving judicially in the matter, are by this fact alone and without necessity for any special declaration, void."

By Article 509 of the Fiscal Code of Costa Rica, published in 1885, and ever since in force, it is provided that "landed property is transferable gratuitously or for a price to Costa Ricans or foreigners. Lands included in a zone one mile wide along the coasts of the seas and banks of navigable rivers are not alienable." On September 11, 1900, the President of the French Republic, as aforesaid, awarded the territory in which all of the plaintiff's banana lands before mentioned are situated to the United States of Colombia, and thereafter the said parties denouncing allowed more than six months to pass counting from the date of last notification without moving judicially in the matter, and the said denouncements thereby became void. The said Jose Astua Aguilar was from March, 1905, till May, 1906, Secretary of Foreign Relations of Costa Rica, and at the time and prior to that time he had been Secretary of Public Works of said Republic. 62 63

TWENTY-NINTH.—On or about May 13, 1904, an attempt was made by the said Astua to continue said denouncement proceedings, but such attempt was in violation of said law of April 1, 1896, and was void. Said denouncements also in their actual description did not cover the plantation of the plaintiff and could not have legally covered it

64 since all of the plaintiff's plantation is within one mile of navigable seas and rivers. Nevertheless, on August 1, 1904, the said Astua procured a declaration from a certain court in Costa Rica known as the Court of Common Pleas, that the said land on which plaintiff's plantation was situated by virtue of said denouncements belonged to him and his associates. Said proceedings were *ex parte* and without notice to this plaintiff, and the said land was not within the jurisdiction of said court, or of the Republic of Costa Rica, and said proceedings were unlawful and void. Nevertheless, in order more fully to carry out the said com-
65 bination and conspiracy, and to drive this plaintiff out of business, and on or about August 30, 1904, Minor C. Keith and others procured a transfer in writing of said lands to be made to them by the said Astua and his associates. In such matters they represented and acted as agents for the defendant, and in the said proceedings one Ricardo Pacheco, formerly Secretary of State of Costa Rica, was attorney for them. On information and belief that said lands were afterwards transferred to the Northern Railway Company of Costa Rica.

THIRTIETH.—The sole object of the defendant in
66 buying up said alleged title was to prevent the plaintiff from operating its said plantation, or any part thereof, and from having any outlet for the bananas and other fruit produced thereon, and it was done in pursuance of the contracts, combinations and conspiracies aforesaid.

THIRTY-FIRST.—This plaintiff since such unlawful interference with its banana plantations and business in the said district, has been diligent to induce the Government of the United States to interfere on its behalf, and induce the Government of Costa Rica to withdraw said soldiers and of-

ficials so that plaintiff might peaceably continue 67
its business of exporting bananas and other tropical fruit to the United States. But defendant both before the Department of State of the United States and before the Government of Costa Rica, has opposed and thwarted said efforts of the plaintiff, and has urged the United States to refrain from interfering in the premises, and has urged the Government of Costa Rica to continue such forcible seizure and occupation of plaintiff's plantation, railway and other property, and as plaintiff is informed and believes, has persuaded certain officials of the Government of Costa Rica to continue such forcible seizure and occupation, and the 68
said Government of Costa Rica has continued down to the commencement of this suit, such forcible seizure and occupation.

THIRTY-SECOND.—Omitted.

THIRTY-THIRD.—The defendant herein has sought to injure the plaintiff's business by offering positions to its employees, and by discharging and threatening to discharge from its employ any persons who were stockholders of the plaintiff.

THIRTY-FOURTH.—The said United Fruit Com- 69
pany has contracted, combined and conspired with the persons and corporations hereinbefore mentioned to destroy the market for the sale of bananas by the growers to exporters, which existed formerly in the West Indies and Central and South America, as alleged in the sixth article of the complaint herein, by driving purchasers out of the market, outbidding them to such an extent as to make it impossible for them to buy at a profit, and persuading them to join or sell out to said combination and conspiracy. The said combination and conspiracy has thus driven out or has combined

70 and conspired with those who purchased bananas from the plantations, and has then regulated the prices at which bananas could be bought, and has purchased some existing plantations, and has made contracts covering long periods with the planters of other plantations for the sale of bananas. As a consequence the producers of fruit being unable to sell to anyone else were forced to accept any terms offered by those in said combination and conspiracy, and to sell out or make long contracts for the sale of their bananas to those who were engaged in said combination and conspiracy, and such contracts were actually entered into and were
71 in force at all the times herein mentioned, and as a consequence there was no market in which bananas were for sale for export in sufficient quantities to enable the plaintiff to buy them and ship them by steamer to the United States, and plaintiff was thereby prevented from buying any bananas and shipping them and selling them in the United States, as it would otherwise have done to its great profit.

THIRTY-FIFTH.—The aforesaid contracts, combinations and conspiracies were entered into by the defendant for the purpose of restraining trade and
72 commerce with foreign nations and among the several States and were combinations and conspiracies for that purpose. All of the acts above set forth were done by the defendant under and in pursuance of the contracts, combinations and conspiracies aforesaid. Said contracts, combinations and conspiracies and the acts done thereunder were done for the purpose of restraining and they did in fact restrain trade and commerce with foreign nations, and among the several States.

THIRTY-SIXTH.—Said United Fruit Company, in manner and form as aforesaid, has attempted to

monopolize and has monopolized and has combined with other persons and corporations hereinbefore mentioned, to monopolize part of the trade and commerce among the several States of the United States and its trade with foreign nations, and especially the trade in bananas between Central and South America and the West Indies and the United States, and the plaintiff has been injured in its business and property thereby and its business has been broken up and destroyed. 73

THIRTY-SEVENTH.—From the time plaintiff acquired the ownership of said plantation, it has produced large crops of bananas monthly, and on or about October 1, 1905, the plantation came into full bearing, but through the acts and conduct aforesaid of the defendant herein, plaintiff has been wholly deprived of the use of said plantation or any part thereof in its said business, and has been prevented from gathering and marketing the product of any part of said plantation. Said plaintiff has been prevented from buying any bananas from other banana plantations because said banana market for export was wholly controlled by said defendant, and those contracting, combining and conspiring with it, and was thereby prevented from exporting the same and selling the same at its net value in the United States separately and in combination with its own fruit, and has thereby suffered additional damage. And said plaintiff has suffered great damages to its said railway and the right of way thereof, and the supplies sent to construct it, and to its floating equipment and plantation because it has not been allowed to go on with its work and business aforesaid, all to its damage in the sum of two million dollars. 74 75

Wherefore the plaintiff demands judgment against the defendant that it may recover three-

76 fold the damages by it sustained as above set forth, together with the costs of this suit, including a reasonable attorney's fee.

WHEELER, CORTIS & HAIGHT,
Attorneys for Plaintiff,
Office and Post Office Address,
No. 21 State St.,
Manhattan,
New York City.

EVERETT P. WHEELER,
Of Counsel.

Southern District of Alabama, ss.:

77 H. B. MENDENHALL, being duly sworn, deposes and says: I am the Secretary and Treasurer of the American Banana Company. I have read the foregoing complaint and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true. The reason that this verification is not made by the plaintiff is that it is a corporation and incapable of making the same. The sources of my information and the grounds of my belief of the truth of the allegations contained in said complaint are documents in my
78 possession and by knowledge of the facts therein alleged, as Secretary and Treasurer of the plaintiff.

H. B. MENDENHALL.

Sworn to before me, this 10th day of September, 1906.

RICH'D JONES,
[SEAL.] Clerk U. S. Circuit Court,
Sou. Dist. of Alabama.

(Endorsed)—U. S. Circuit Court, Southern Dist. of New York.—American Banana Company, Plaintiff, against United Fruit Company, De-

fendant. — Amended Complaint. — Wheeler, Cortis & Haight, Attorneys for Plaintiff, 21 State Street, New York City, N. Y.—U. S. Circuit Court, Southern District of N. Y.—Filed Mar. 20, 1908.—John A. Shields, Clerk. 79

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY, Complainant, vs. UNITED FRUIT COMPANY, Defendants.	In Law.

80

The defendant above named by Strong & Cadwalader, its attorneys, answers the complaint herein as follows:

FIRST.—This defendant admits the allegations of the complaint contained in paragraphs numbered first and second of the complaint. 81

SECOND.—This defendant admits that it was organized as a corporation on or about the 30th day of March, 1899, and was at all the times in the complaint mentioned and now is engaged in importing bananas into the United States from the West Indies and Central and South America. This defendant admits and alleges that prior to and at all times since the organization of this defendant the business of importing bananas from the West In-

82 dies and Central and South America into the United States was and now is conducted by several persons and corporations and that such persons and corporations were and now are actively competing one with another in said trade.

THIRD.—Answering the allegations contained in paragraph fourth of the complaint, this defendant admits that the persons and corporations in said paragraph named were prior to March 30, 1899, engaged in the trade of importing bananas from the West Indies into the United States, but whether or not said persons and corporations were the prin-
83 cipal persons and corporations so engaged this defendant has no knowledge or information sufficient to form a belief.

This defendant denies any knowledge or information sufficient to form a belief as to whether or not said persons and corporations sold the bananas so imported principally in the eastern States of the United States.

FOURTH.—Answering the allegations contained in paragraph fifth of the complaint this defendant admits that the persons and corporations named therein were prior to the said 30th day of March,
84 1899, engaged in the trade of importing bananas from Central and South America into the United States, but whether or not said persons and corporations were the principal persons and corporations engaged in the said trade this defendant has no knowledge or information sufficient to form a belief.

This defendant denies any knowledge or information sufficient to form a belief as to whether or not said persons and corporations sold the bananas so imported by them principally in the Central, Western and Southern States of the United States.

This defendant denies that it has any knowledge

or information sufficient to form a belief as to the allegation that the Banes Fruit Company, The Dominican Fruit Company. The Sama Fruit Company and the Columbia Land Company, Limited, were connected with said business of importing bananas into the United States. This defendant admits that J. B. Cefalu & Brother were engaged in the business of importing bananas into the United States. 85

FIFTH.—Answering the allegations contained in the sixth paragraph of the complaint, this defendant admits that excepting the Banes Fruit Company, The Dominican Fruit Company, the Sama Fruit Company and The Columbia Land Company, Limited, the persons and corporations mentioned in Articles Fourth and Fifth of the complaint, prior to said 30th day of March, 1899, imported from the West Indies, Central and South America, into the United States bananas grown upon their own plantations, and purchased from others. Except as in this paragraph admitted, this defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragrap sixth of the complaint. 86

SIXTH.—Answering the allegations contained in paragraph seventh of the complaint, this defendant admits that it was organized with an authorized capital stock of twenty million dollars ($20,000,000) of which at least eleven million dollars ($11,000,000) was actually subscribed, and that additional subscriptions were thereafter taken which increased its capital to more than fifteen million dollars. 87

This defendant on information and belief, denies that for the purpose of controlling or monopolizing the trade of importing bananas into the United States, and to regulate the prices at which such

88 fruit should be bought and sold, and to prevent competition in the puchase and sale of such fruit, this defendant during the years 1899, 1900 and subsequent years purchased the property and business of several of the individuals and companies alleged in the complaint to have been competing individuals and companies, and that as a part of each of such purchasers, except in cases where the seller became an officer of the defendant, or was otherwise identified with it, it exacted the condition that those whose property and business were purchased should agree not to further engage in said trade.

89 SEVENTH.—Answering the allegations contained in paragraph eighth of the complaint this defendant, on information and belief, denies that for the purpose of controlling and monopolizing the trade of importing bananas into the United States and to regulate the prices at which such fruit should be bought and sold and to prevent competition in the purchase and sale of such fruit, it bought the property and business of the companies named in paragraph eighth of the complaint, and this defendant denies that in each case except where the seller became an officer of the defendant, or was otherwise
90 identified with it, it exacted or imposed the condition that those whose property and business were purchased should agree not to further engage in said trade, or that each of said persons did severally agree not to further engage in said trade whereby the competition aforesaid was extinguished.

This defendant is informed and believes and, therefore, admits that the West India Fruit Company, the Monumental Fruit Company and Byer & Son have gone out of the fruit importing business, and that the Eureka Banana and Development Company has failed, but this defendant denies that

the latter company has been bought up by this defendant. 91

EIGHTH.—Answering the allegations contained in paragraphs ninth and tenth of the complaint, this defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not during the year 1899 and subsequent years this defendant made and entered into contracts with the persons and corporations named in Article tenth of the complaint, or as to whether or not any such contracts were for the regulation of the quantity of bananas to be purchased and sold by each of said parties, or for the regulation of the 92
prices at which the same were to be purchased, or the manner of selling the same, or for the other purposes mentioned in article ninth of the complaint. And this defendant denies that it has any knowledge or information sufficient to form a belief as to the other allegations contained in paragraphs ninth and tenth of the complaint.

NINTH.—This defendant admits that it now holds all of the capital stock of the Fruit Dispatch Company, but denies that it has any knowledge or information sufficient to form a belief as to every other allegation contained in paragraph eleventh 93
of the complaint.

TENTH.—This defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph twelfth of the complaint, except that it admits that the capital stock of the Northern Railway Company of Costa Rica is owned by this defendant.

ELEVENTH.—Answering the allegations contained in paragraphs thirteenth, fourteenth, fif-

94 teenth and sixteenth of the complaint, this defendant admits that the three certain contracts described in paragraphs fourteenth, fifteenth and sixteenth were entered into, to wit: One dated December 8, 1899, between Andrew W. Preston of the first part; Camors, McConnell & Company of the second part, and Louis Weinberger, Jacob Weinberger, Victor Camors and Charles Weinberger of the third part; and Kroesmann, Braden & Company of the fourth part. Another bearing said date between the United Fruit Company of the first part, and H. L. McConnell, Louis Weinberger and Rudolph Braden of the second part; and the
95 third, between the Fruit Dispatch Company of the one part, and Camors, McConnell Company of the other part, dated the 27th day of January, 1900, true copies of which contracts are hereto annexed as a part of this answer, marked respectively Exhibits A, B and C, and the defendant refers to the said contracts for a true statement of the purport and effect thereof; and except as in this paragraph admitted, this defendant denies any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraphs thirteenth, fourteenth, fifteenth and sixteenth of the complaint. And defendant further alleges that
96 the said contracts, copies of which are hereto annexed, marked Exhibits B and C were respectively cancelled and abrogated by consent of the parties thereto in the year 1902.

TWELFTH.—On information and belief this defendant denies the allegations contained in paragraph seventeenth of the complaint.

"TWELVE A.—Answering the allegations contained in Paragraph Seventeen A of the complaint, this defendant admits that in October, 1899, defendant acquired 200 shares of the capital stock of

the Camors-Weinberger Banana Company; that in 97
December, 1899, defendant acquired 50 shares of the capital stock of the Orr-Laubenheimer Company; that in June, 1901, defendant acquired 500 shares of the capital stock of the Bluefields Steamship Company, Limited; that in August, 1905, defendant acquired 180 shares of the capital stock of Thacker Brothers Company; and that in May, 1905, defendant acquired 1,260 shares of the capital stock of the Atlantic Fruit Company. The stocks so acquired by defendant were by it owned from the dates of their several acquisitions, as aforesaid, until the commencement of this action.

Except as above admitted, defendant denies 98
every allegation contained in said Paragraph Seventeen A."

THIRTEENTH.—This defendant denies on information and belief the allegations contained in paragraph eighteenth of the complaint.

FOURTEENTH.—This defendant denies on information and belief the allegations contained in paragraphs nineteenth and twentieth of the complaint.

FIFTEENTH.—Answering the allegations contained in paragraph twenty-first of the complaint 99
this defendant admits that during the year 1903 one Herbert L. McConnell began to make a banana plantation and to plant bananas along the banks of the Sixiola River and in the valley of said river in the Sixiola district, and to build a railway connecting said plantations with a place on the Atlantic Ocean called Gadocan for the purpose of transporting the bananas grown on said plantations to the Atlantic coast; but this defendant, on information and belief, alleges that said McConnell had no right, under the laws of the United States of Colombia or of the Republic of Costa Rica, to

100 enter upon said lands, or to establish any plantations or to construct a railway thereon; that so far as concerns the lands situated on the south bank of said Sixiola River they were a part of the national lands of the United States of Colombia, and at the times that said McConnell entered upon said lands and established said plantations said lands were not susceptible of private ownership by reason of the fact that there was no law then in force in the Republic of the United States of Colombia authorizing or permitting the acquisition by private individuals of title to or interest in any public lands in the Department of Panama of
101 said United States of Colombia, all such laws relating to or permitting such acquisition having been suspended so far as the Department of Panama was concerned, by an executive decree of the general Government of the United States of Colombia on or about the 6th day of February, 1881, as lawfully they might be; that so far as concerns the lands lying on the north bank of the Sixiola River, upon which it is alleged that said McConnell began the establishment of plantations and the construction of a railroad, defendant, upon information and belief, alleges that he had no lawful right to enter upon
102 and cultivate said lands, as will be hereinafter shown and set forth in the seventeenth and twentieth paragraphs of this answer; and the defendant, upon information and belief, alleges that the said McConnell had no right to construct a railroad upon or through said lands for the reason that no concession or permission for that purpose had ever been granted to him either by the Governments of the United States of Colombia or of the Republic of Costa Rica, and, without such express concession and permission granted by the legislative authority of the Governments of said countries, he had no right to construct the said railroad.

Except as in this paragraph admitted defendant 103
denies that it has any knowledge or information sufficient to form a belief as to the other allegations contained in paragraph twenty-first of the complaint.

SIXTEENTH.—On information and belief this defendant denies the allegations contained in paragraph twenty-second of the complaint.

SEVENTEENTH.—This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph twenty-third of the complaint, except that 104
this defendant is informed and believes, and therefore admits that a disputed question as to the true boundary line between the United States of Colombia and the Republic of Costa Rica was referred by the said nations to the President of the French Republic who, in or about the month of September, 1900, made a pretended award whereby he attempted to fix the said boundary line in a manner which might have included the territory along both banks of the Sixiola River within the territory of the United States of Colombia. On information and belief this defendant avers that all that portion of the territory in dispute between the said Republic 105
of Costa Rica and the United States of Colombia which lies north of the Sixiola River had from time immemorial been claimed and occupied by the Republic of Costa Rica, and the said Republic of Costa Rica at all times exercised sovereignty and jurisdiction over the same; and this defendant, upon information and belief, alleges that the terms of said pretended award, made by the President of France, were so vague and indefinite that said pretended award was impossible of execution, and said award was unsatisfactory to both of said nations, and that the same has never been accepted

106 by them, nor was the boundary line ever actually fixed or attempted to be fixed pursuant to the terms of the said award, but that the same is still a matter of negotiation between the Republic of Panama as successor to the United States of Colombia and the Republic of Costa Rica, and that in the meantime and pending the settlement of such dispute, the Republic of Costa Rica retains, and the Republic of Panama concedes to the Republic of Costa Rica, the jurisdiction and sovereignty over all of said territory lying north of the Sixiola River. This defendant is informed and believes and therefore admits that, Governor Duran of the Depart-
107 ment of Panama, of the United States of Colombia, issued to one Romero a document purporting to be a concession to build a railroad for the transportation of bananas in and through the territory lying on the north bank of the Sixiola River from the bank of said river to the place called Gadocan, and that after Congress adjourned, he approved of a transfer of the same to said McConnell, but upon information and belief this defendant alleges that the said pretended concession so granted to said Romero and so attempted to have been transferred to said McConnell, was illegal, void and of no effect, inasmuch as said official had no right, power or authority, under the Constitution and laws of
108 the Republic of the United States of Colombia, to make or grant any such concession or to consent to the transfer thereof to said McConnell; and on information and belief, this defendant avers that said alleged concession was declared invalid and of no effect by the General Government of the said Republic of the United States of Colombia prior to the time that said McConnell attempted to construct said railroad. And this defendant, upon information and belief, further alleges that said official had no right, power or authority to make or tive a concession to said Romero on and through tries, he

lands lying on the north bank of said Sixiola River 109
to said place called Gadocan inasmuch as said territory was without the jurisdiction of the United States of Colombia, and within the jurisdiction of the Republic of Costa Rica, which latter was alone competent to grant any such concession.

EIGHTEENTH.—On information and belief this defendant denies the allegations contained in paragraph twenty-fourth of the complaint.

NINETEENTH.—This defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in par- 110
agraph twenty-fifth of the complaint.

TWENTIETH.—This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph twenty-sixth of the complaint, but, upon information and belief, this defendant alleges that if said H. L. McConnell did attempt in June, 1904, or at any other time, to sell and transfer the plantations, or any concessions in connection with the same, to the plaintiff, such attempted sale and transfer was null and of no effect for the reason that so far as concerned the lands lying on the north bank of the 111
Sixiola River said McConnell had no right, title or interest therein susceptible of sale or transfer as aforesaid; said lands at the time same were entered upon by the said McConnell constituted a part of the public lands of the Republic of Costa Rica, and, under the laws of said Republic applicable thereto, could be reduced to private ownership only in the manner and under the conditions thereby provided; that under the law of Costa Rica relating to the acquisition of the public lands of said Republic no right, title or interest could be acquired therein by mere possession and cultivation, but it was neces-

112 sary that the person so seeking to acquire the same should make formal application to the Government for the acquisition or denouncement of said lands, should have the same surveyed and the boundaries thereof fixed, and should pay the Government a certain compensation therefor; and, on information and belief, this defendant avers that neither said McConnell nor his alleged transferee, the plaintiff, ever took any of the steps or proceedings aforesaid, and therefore, the said McConnell had no right, title or interest in or to said lands which could be conveyed by him to the plaintiff herein. And on information and belief, this de-
113 fendant avers that the laws of the Republic of Costa Rica require that all contracts purporting to convey title to or interest in lands or other real property shall be presented to certain officials for examination and inscription on the public records of said country, and without such presentation and inscription by said officials such alleged contracts are without force and effect as to third persons; and defendant alleges, on information and belief, that no contract or document purporting to evidence the sale and transfer by said H. L. McConnell to the plaintiff herein of the said plantations and concession has ever been presented to, or in-
114 scribed on the public records by the proper officials in the Republic of Costa Rica, as required by the laws of said country.

TWENTY-FIRST.—This defendant denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph twenty-seventh of the complaint, except that this defendant denies that it induced the Costa Rican soldiers and officials to seize the plantations referred to in said paragraph, or the cargo or railroad or other supplies therein referred to, or that it attempted to induce or did induce said soldiers and officials to hold said goods, or to occupy said

plantations, or to stop the construction or operation of said plantation railway, or to prevent the importation of supplies for said plantation railway, or the export of bananas therefrom; but, on information and belief, this defendant avers that such seizures as were made by said Costa Rican soldiers and officials, of the railroad and other supplies, alleged to belong to plaintiff, were made because said supplies were being smuggled into the territory of the Republic of Costa Rica by the said McConnell or the plaintiff herein in violation of the customs laws of said Republic. 115

TWENTY-SECOND.—Answering the allegations contained in paragraphs twenty-eighth and twenty-ninth of the complaint, this defendant admits and alleges that in or about the mouth of March, 1900, one Jose Astua Aguilar and others began proceedings in Costa Rica known as denouncement proceedings to acquire title to certain lands on and near the north bank of the Sixiola River in the Republic of Costa Rica. That in such proceedings in the Court in which the same were then pending, H. L. McConnell referred to in the complaint, duly intervened and claimed that the denouncement of said Josa Astua Aguilar and others was illegal upon divers and sundry grounds asserted by him, and thereafter such proceedings were had in said matter as to result in a judgment by the First Hall of Appeal of the Supreme Court of Justice of the Republic of Costa Rica sustaining such proceedings on the part of said Josa Astua Aguilar and others, rejecting the intervention of the said McConnell, and deciding that the said McConnell, not having or claiming any rights in and to the said land, except the mere right of possession and the right to be compensated for any improvements made by him upon said land, was without interest therein, and could not legally contest the said de- 116 117

118 nouncement proceedings, and remitting the cause to the Court of First Instance to continue the denouncement and the adjudication with respect thereto; whereupon the said cause was so remitted to the Court of First Instance and such proceedings were thereupon duly had therein that title to said land was confirmed in the said Jose Astua Aguilar and his associates, and in the Northern Railway of Costa Rica, their assignee.

Upon information and belief, defendant further alleges that thereafter, and after the entry of the final decree in the said denouncement proceedings establishing title to the said lands in the said Josa
119 Astua Augila and others, proceedings were instituted pursuant to the laws of the Republic of Costa Rica for the purpose of establishing the value of the improvements claimed by the said McConnell to have been placed upon said lands by him, and that said McConnell, through his duly appointed agent and attorney-in-fact, appeared and defended in said proceedings, but that during the course of said proceedings, and in or about the month of September, 1906, the said McConnell withdraw from said proceedings and, for the first time, gave notice to the said Court that he had transferred his interest in the said lands and said plantations to the
120 plaintiff herein, and defendant further alleges on information and belief that at all the times during the pendency of said proceedings the said McConnell was the President of the plaintiff corporation herein.

TWENTY-THIRD.—This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph thirtieth of the complaint; and this defendant alleges, upon information and belief, that H. L. McConnell, above referred to, during the years 1903 and 1904 made numerous applications to induce the

Government of the United States to interfere on his behalf, and that on or about the 22d day of December, 1904, the said H. L. McConnell filed a memorial with the Department of State of the United States whereby in his own behalf he prayed the intervention of the Government of the United States with respect of sundry illegal acts alleged to have been committed by the Government of Costa Rica and its officials, and asked for an award of damages to him for himself. 121

TWENTY-FOURTH.—Answering the allegations contained in paragraph thirty-first of the complaint, this defendant admits that the said H. L. McConnell and the plaintiff have endeavored to induce the Government of the United States to interfere on their behalf and induce the Government of Costa Rica in various ways to recognize and enforce rights claimed by them respectively in regard to the said property on the Sixiola River in the Republic of Costa Rica, but without avail; and except as in this paragraph admitted, defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph thirty-first of the complaint. 122

TWENTY-FIFTH.—This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs thirty-second, thirty-third, thirty-fourth, thirty-fifth and thirty-sixth of the complaint. 123

TWENTY-SIXTH.—This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph thirty-seventh of the complaint.

124 WHEREFORE, defendant prays that the complaint herein be dismissed, with costs.

STRONG & CADWALADER,
Attorneys for the Defendant.
Office and Post Office address,
40 Wall Street,
New York City.

STOREY, THORNDIKE, PALMER & THAYER,
W. B. SPENCER,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

125 IRVIN CADMUS, being duly sworn, says that he is the agent in the State of New York of the United Fruit Company, the defendant in the above-entitled action; that his office as such agent is at Pier No. 1, North River, in the City of New York; that he had read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and as to such matters he believes it to be true; that the reason why this affidavit is not made by the said defendant is that the said defendant is a foreign corporation—to wit, a corporation organized and ex-
126 isting under the laws of the State of New Jersey. That the sources of his information and grounds of his belief as to all matters therein stated not to be upon knowledge, are derived from reports of agents, attorneys and officers of the defendant having in charge the investigation of the matters referred to in the complaint.

IRVIN CADMUS.

Sworn to and subscribed before me }
this day of November, 1906. }
A. W. ANDREWS, (42)
Notary Public,
[SEAL.] N. Y. Co.

Exhibit "A."

127

THIS AGREEMENT made between ANDREW W. PRESTON of Brookline in Massachusetts of the first part, and J. B. CAMORS, of New Orleans, and HERBERT L. MCCONNELL, of Mobile, doing business under the firm name of Camors-McConnell & Company of the second part, and LOUIS WEINBERGER, JACOB WEINBERGER, VICTOR CAMORS and CHARLES WEINBERGER of the third part, and RUDOLF BRADEN, of Boca del Toro, Republic of Colombia, J. W. KROESMANN, ERNST BRADEN, and JOHN C. DEHLS, doing business under the firm name of Kroesmann, Braden and Company, of the fourth part.

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WHEREAS, the said Camors, McConnell & Company are engaged in the business of growing, transporting and selling tropical fruits, and desire to transfer all of their said business and all of their good-will, contracts, choses, franchises and privileges, used, useful or convenient in conducting said business or appertaining thereto, to a corporation as hereinafter described, and the other said parties of the third and fourth parts are interested in the said business of the said Camors, McConnell & Company, and the said Preston desires to obtain an interest in the said new corporation.

129

NOW, THEREFORE, in consideration of the premises and of the mutual agreement hereof, and of the sum of one dollar unto the said other parties by the said Preston in hand paid, the receipt whereof is hereby acknowledged, it is hereby agreed as follows:

1st. The said Preston shall cause to be formed a corporation under the laws of the State of New Jersey, to be called the Camors, McConnell Company, hereinafter referred to as the new corpora-

130 tion, with a capital stock of sixty thousand, one hundred and twenty-five dollars, divided into four hundred and eighty-one shares of the par value of one hundred and twenty-five dollars each, with power to carry on the present business of Camors, McConnell & Company, and to be governed by a Board of five Directors. The expense of forming the new corporation shall be borne by it.

2nd. The said Camors, McConnell & Company shall sell, assign and transfer to the said new corporation all the property, effects, good-will, contracts, franchises and privileges, and all books,
131 papers, choses and documents used in or appertaining to their said business, whether vested or standing in the name of the said copartnership, or of any individual member thereof, or of any other person, firm or corporation, and in return therefor the new corporation shall issue to the said Camors, McConnell & Company, three hundred and twenty-one shares of its capital stock, full paid and non-assessable, and shall assume the debts, liabilities and obligations of the said Camors, McConnell & Company, specified in the second schedule hereto. The said Camors, McConnell & Company, hereby guarantee that they own and will assign and transfer to the new corporation hereinbefore described,
132 the property and effects specified in the first schedule hereto. It is expressly understood and provided that the plantations which are now owned and held by the Boca del Toro Banana Company, but not its loading plant, shall be included in the property hereinbefore described, as used in and appertaining to said business.

3rd. The said Preston shall buy and the said Camors, McConnell & Company shall sell and deliver to the said Preston, and to such persons as he shall appoint, one hundred and sixty-one shares

of the said capital stock of the new corporation for 133
the sum of thirty thousand dollars payable in cash.
To the end that the said Preston shall retain, so
long as he desires, the power to elect three of the
five directors of the new corporation, and the other
stockholders shall have and enjoy the power to
elect two of the five directors, the said Preston
agrees to and shall transfer and assign one of the
said one hundred and sixty-one shares so deliver-
able to him to a trustee of his own nomination, to
be held by said trustee, irrevocably and perpetually
in trust to vote in person or by proxy upon said
share in all elections of directors of said company,
for such three directors as the said Preston or his 134
assigns shall nominate and for such two directors
as the owners of the one hundred and sixty shares
of the capital stock retained by the second, third
and fourth parties of their assigns shall nominate;
but the said one share of stock so transferred to
said trustee shall not vote for any other power
whatsoever, and the holder thereof, shall have no
power to vote upon the same for any other purpose
whatsoever at any time or proceedings of the said
new corporation, and no dividend shall be declared
upon said stock, it being the purpose of this agree-
ment that the second, third and fourth parties, and
their assigns shall receive one-half of the dividends
declared by the new corporation, and the said 135
Preston and his assigns shall receive the other one-
half thereof. Said transfer to said trustee shall be
upon the further trust, that if by reason of any
proceedin[illegible]udgment, decree, finding or order of
any Court or otherwise, the said share and its
holder should despite the above written provision,
share in dividends or in distribution at winding
up, then the same shall be by said trustee divided
ratably among the holders of all the other shares
in said corporation, according to their respective

136 holdings at the time such dividends or distributions shall occur.

4th. The said Preston hereby agrees to subscribe for eighty additional shares in the capital stock of the new corporation, and pay for the same the sum of ten thousand dollars in cash immediately upon incorporation and the said parties of the second, third and fourth parts hereby agree that they will subscribe for eighty additional shares in the capital stock of the new corporation, and pay for the same the sum of ten thousand dollars in cash immediately upon incorporation.

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5th. The said J. B. Camors and Herbert L. McConnell, Louis Weinberger, Jacob Weinberger, Victor Camors, Charles Weinberger, Rudolf Braden, J. W. Kroesmann, Ernest Braden and John C. Dehls, hereby jointly and severally covenant and agree that they will not either individually or by or through a corporation jointly or severally, directly or indirectly engage in the growing or importing or selling of tropical fruits or any other business directly or indirectly in competition with the new corporation, or with the United Fruit Company, except through the new corporation, until
138 after the said Camors, McConnell Company, the new corporation, shall have ceased the active continuance and prosecution of the business of importing and selling such fruit, or shall have failed to have shown a profit for any calendar year after 1899. All profits earned by the new corporation shall be divided every three months by dividends declared. This provision shall not exclude any of the parties hereto from being concerned in the business or businesses of the Bluefields Steamship Company, Ltd., of the Camors Weinberger Banana Company, Ltd., or the Orr-Laubenheimer Company, and provided further this provision shall not exclude Kroesmann,

Braden & Company, J. W. Kroesmann, Ernst Braden, John C. Dehls or Rudolf Braden from engaging in a general mercantile business or from exporting cocoanuts, or other produce excepting tropical fruit.

6th. The said second, third and fourth parties hereby agree that they will obtain from all persons directly or indirectly interested in the partnership of Camors, McConnell & Company, and so far as they are able to do so from all persons such conveyances and assignments as shall be necessary in the legal opinion of H. Pillans, Esq., to carry out these agreements.

7th. The said second, third and fourth parties jointly and severally for themselves, their successors, executors and assigns covenant that they will execute all deeds and assurances, and do all things which shall be necessary or convenient more fully and perfectly to vest in the new corporation the good will and effects provided herein to be vested in the new corporation or intended to be so vested, and will execute all such further instruments and do all such further things as shall be necessary or convenient to carry out these presents according to the true intendment thereof.

8th. Said Preston agrees that he will use his influence to the end that the manager of the new corporation in the United States shall be H. L. McConnell so long as he will act, provided said McConnell is in his opinion and in that of a majority of the remaining shareholders in the said new corporation other than himself and his assigns, a competent and fit person therefor, and that in case of the unfitness of said McConnell in his opinion and that of the said remaining shareholders or of his unwillingness to longer serve, then that

142 he will use his influence so that the manager of the said new corporation in the United States shall be a person agreeable to the shareholders, other than the said Preston and his assigns, provided such manager shall be in his opinion a competent and fit person.

9th. The new corporation shall purchase from the said Groesmann, Braden & Company all their right, and the rights of John H. D. Finke in and to a banana farm at Boca del Toro now managed by them, for the sum of eight thousand dollars in gold, upon receiving sufficient documents of sale
143 according to the laws of the Republic of Colombia, and the new corporation shall buy from the said Kroesmann, Braden & Company its loading plant, consisting of two steam launches and eight lighters at the said Boca del Toro, for the sum of thirty-one hundred and seventy dollars, plus the cost of one new engine, which has been put in one of the launches "Marinoposa," not to exceed one-hundred dollars, (the list of the said loading plant is hereto annexed in the third schedule), and the new corporation shall pay the said Braden three hundred dollars for services rendered in superintending the farms for the said Camors, McConnell & Company.

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10th. The said new corporation shall buy the present existing loading plant now belonging to the Boca del Toro Banana Company, now consisting of three launches, one sloop and ten or eleven lighters at such valuation as shall be agreed upon between the said Rudolf Braden and Michael T. Snyder, and in case they cannot agree then such valuation as shall be designated by such person as shall be selected by the said Braden and Snyder.

11. The said new corporation shall enter into an agreement with the said Kroesmann, Braden

& Company, extending for a period of ten years, 145
which shall contain substatnially provisions similar to those provisions contained in the agreement between the Boca del Toro Banana Company and Kroesmann, Braden & Company, dated the 15th of October, 1898, in paragraphs numbered 10th, 11th, 12th, 13th and 17th, and the last said contract shall contain a provision whereby the new corporation shall agree not to charge any greater amount for freight for goods shipped for account of Kroesmann, Braden & Company from New Orleans to Mobile for shipments to Boca del Toro by steamers of said new corporation than it is obliged to pay for the same, and the said new cor- 146
poration shall use its efforts to keep in effect existing verbal arrangements with respect to carrying the goods above described between New Orleans and Mobile.

12th. It is also agreed between the parties hereto that the directors of the new corporation shall receive no compensation for acting as such directors.

IN WITNESS WHEREOF the parties have hereto set their hands and seals this 8th day of December, A. D. 1899.

ANDREW W. PRESTON, 147
By B. W. PALMER.
HEBERT L. MCCONNELL.
CAMORS, MCCONNELL & CO.
LOUIS WEINBERGER.
KROESMANN, BRADEN & CO.
R. BRADEN.
J. B. CAMORS.
V. CAMORS.
JACOB WEINBERGER.
CHAS. WEINBERGER.
p p LOUIS WEINBERGER.
J. W. KROESMANN.
ERNST BRADEN.
JOHN C. DEHLS.

148 The first schedule hereinbefore referred to:

The second schedule hereinbefore referred to:

THIRD SCHEDULE:

Launch "Spray"	$1200.
Launch "Mariposa"	800.
Western River, 1 square lighter, 500-800	150.
Bahia Honda, 1 square lighter, 500-600	150.
Coal, 1 square lighter, 500-600	150.
John Crow Point, 1 small, sharp bow, 250-300	75.
Shepherd Island, 1 square, with roof	120.
149 Bellevue, 1 square, without roof	100.
Bocas, 1 hauled up order repair, 800	225.
Changuinola, 1 sharp bow, coppered, 500-600	20.
Total	$3170.

Extract from the contract dated 15th October, 1898, referred to in Paragraph 11th of the foregoing agreement:

10. The party of the first part agrees to carry all freight from Mobile at the rate of $6 net per
150 ton weight for general merchandise, excepting flour and rice, for which staples a reduction of $1 net per ton weight will be made, and to deliver to said party of the second part all such freights at Boca del Toro within ship's tackle. Lumber at the rate of $8 per thousand feet. Shingles at the rate of $2 per thousand shingles of 4 shingles each. Furniture at the rate of $9 per net ton weight. Should any European goods be shipped to party of the second part from Europe on through rate of freight such through rate shall govern, but should said party of the second part prefer to have goods shipped to them from Europe not on through rates

of freight, then such rate of freight on foreign 151
goods shall be from New Orleans or Mobile to Boca del Toro, thirty (30) cents per hundred pounds or fifteen (15) cents per cubic feet, at option of the party of the first part.

11. It is further agreed that the party of the first part will meet competition in case other line or lines should reduce such rates of freight to Boca del Toro, but such reduction not to exceed 25 per cent. of the rate now agreed upon.

12. The party of the first part agrees to deliver to the party of the second part within ship's tackle at Boca del Toro, good Mobile coal as used by the 152
banana steamers at the rate of $4 United States currency, per ton net 2000 pounds, but only in such quantities as required by the party of the first part for the use of their steam launches.

13. It is further agreed that the party of the first part will give to members or clerks of the firm or family of the party of the second part free passage to Boca del Toro and vice versa, excepting passenger's board, which must be paid by party of the second part, and also provided that the quarantine or other restrictions allow the carrying of such passengers, and that such carrying of passengers does not endanger the cargo. The limit 153
of passengers at one time is agreed to be three persons.

* * * * *

17. It is agreed between the two contracting parties that for the payment of bananas which party of the first part buys at Boca del Toro for their ships, party of the first part will either send U. S. gold currency or checks on the U. S. or drafts of from 3 days sight to not over 30 days sight on the United States of America, or the Boca del Toro office or the party of the first part will draw drafts as just defined for such use, and of three-quarters

of such U. S. currency or checks or drafts the party of the first part agrees to give to party of the second part the preference to buy such drafts or checks or currency at Boca del Toro rates from the Boca del Toro office of said Boca del Toro Banana Company, provided these rates are at all times not lower than within five points of Colon rates for equal amounts and nature of paper or currency. Should at any time said drafts or checks or currency be sold to party of the second part at less than the above mentioned five points party of the second part agrees to make good to party of the first part the difference thus incurred. Should, however, the rate of such exchange be not acceptable to party of the second part, the said last named party agrees to loan to the Boca del Toro office of party of the first part the necessary silver required to load the steamer of the company in question.

TRIAL BALANCE—CAMORS-McCONNELL CO.

JANUARY 4, 1900.

H. L. McConnell, capital a/c		$20,000.00
J. B. Camors, capital		20,000.00
R. Baden (Bocas Agcy.)	$6,622.18	
Utstein #18		1,315.90
Utstein #19	1,667.47	
Espana #8		1,509.73
Espana #9	433.05	
Iberia 1	95.47	
Iberia 2	842.78	
Kroesmann, Braden & Co	465.60	
J. N. Sewell, Agt. (Bocas)	6,100.00	
Profit and Loss		59[illegible]86
Office furniture & fixt	262.00	
Cromwell S. S. Co. (frt)	105.36	
H. L. McConnell Ind a/c		124.55
Fruit Disp. Co. a/c Espana #8		1,423.88
" Utstein 16	17.21	
" Utstein 18	5,912.00	
" Iberia #1	160.45	
F. J. Alvardo & Co	200.00	
Rio Biora Plantation	4,349.60	
Quebrada Nigua Plantation	4,290.93	

	Bocas Loan a/c	2,722.49		157
	M & O R R	4.97		
	So Pacific Co (frt)	66.12		
	Kroesmann, Braden & Co. (Cokes)		318.00	
	Bocas Furniture & Fixt	137.80		
	Cash	10,831.44		
		$45,286.92	$45,286.92	

The first and second schedules hereinbefore referred to are contained on this and following three sheets—B. W. Palmo.

TRIAL BALANCE NOV. 20, 1899.

Folio.				
1	H. L. McConnell Capital a/c		20,000.00	
2	J. B. Camors Capital a/c		20,000.00	
6	R. Braden (Agt Bocas)	10,614.03		
9	Expenses	209.44		158
14	Utstein #14		359.89	
15	Utstein 15		1,471.21	
16	Utstein 16		5,576.26	
17	Utstein 17	922.84		
25	Baracas #12		1,353.13	
26	Baracas 13		1,136.48	
27	Baracas 14	733.65		
45	Espana 4		358.21	
46	Espana 5		617.39	
47	Espana 6		359.94	
48	Espana 7	1,017.53		
72	Merchandise		136.32	
75	Kroesmann, Braden & Co	1,255.26		
82	Bocas Expense	62.25		
100	Profit & Loss	9,212.51		
110	Fruit Dispatch Co. (Sale rifles)		216.95	159
229	Launch & Lighter a/c	62.06		
	Furniture & Fixt. a/c	262.00		
236	P. Cosentino & Co	201.25		
7	Cromwell S. S. Co. (Frt OK)	62.95		
9	F. D. Co. a/c Espana #4	1,487.10		
9	" " " 5		236.40	
247	" " " 6	1,294.69		
355	Copeland & Martin	499.25		
361	F. J. Alvarado & Co., Colon	200.00		
373	Rio Biora Plantation	4,349.60		
373	Bocas Loan a/c	2,722.49		
373	M & O R R	4.97		
374	So. Pacific Co. (Frt OK)	32.59		
255	F. D. Co. a/c Baracoa 12	1,460.79		
	" " " 13	59.37		

160	260 F. D. Co. a/c Utstein 14	$3,152.63	
	" " " 15	629.78	
	261 " " " 16	7,564.71	
	Cash on hand	3,924.98	
		$51,998.72	$51,998.72

TRIAL BALANCE OCT. 23, 1899.

	H. L. McConnell Capital		20,000.00
	J. B. Camors Capital		20,000.00
	R. Braden, Agt. Bocas	10,554.31	
	Expenses	1,375.02	
	Utstein 14	2,103.92	
	Utstein 15	1,062.56	
	Baracoa 11	2,975.94	
	Baracoa 12	1,736.88	
161	Baracoa 13	848.35	
	Espana 3		785.21
	Espana 4	1,156.21	
	Espana 5	1,537.80	
	Espana 6	775.01	
	Merchandise		161.60
	Kroesmann, Braden & Co	45.50	
	Bocas Expense	32.60	
	Cargo a/c	4,988.49	
	Coal a/c	115.05	
	A. Fugozzi & Co	225.00	
	Launch & Lighter a/c	62.06	
	Office Furniture & Fixt	252.00	
	C. C. Taft Co	323.00	
	Plosentino & Co	201.25	
	Cromwell S. S. Co	30.27	
	H. L. McConnell Ind. a/c		154.00
162	Camors W. Ban Co	18.50	
	B. C. McCrossan Frt. Co	300.00	
	Copeland & Martin	566.95	
	F. J. Alvarado & Co	200.00	
	A. Logomorcino & Co., B	93.63	
	A. Logomorcino & Co., C. R	6.52	
	Collins, Grayson & Co	264.38	
	Utstein 10 Claim a/c		300.00
	Utstein 12 Claim a/c		264.38
	W. L. Murdock	397.50	
	Rio Biora Plantation	4,349.60	
	Cash on hand	4,914,34	
		$41,512.75	$41,512.73

CAMORS, MCCONNELL & CO.
Per Nettles

CAMORS, McCONNELL & CO. 163

MOBILE, ALA.

BALANCE SHEET AS OF OCTOBER 10, 1899.

ASSETS.

R. Braden, Agent at Bocas del Toro.....	$5,363.57	
Open Voyage Accounts.....	13,308.85	
Coal	609.54	
Accounts receivable	4,615.38	
Launch & Lighter Accounts.....	62.06	
Office Furniture.....	65.00	
Bio Biora Plantation, bought in Oct., 1899.	4,349.60	
Cash on hand.....	1,352.87	$41,726.87

LIABILITIES. 164

Open Voyage Accounts.....	$1,463.54	
Utstein, Voyages 10 and 12.....	564.38	
Excess Assets over Liabilities.....	39,698.95	$41,726.87
J. B. Camors, Capital Account.....	$20,000.00	
H. L. McConnell, Capital Account.....	20,000.00	
	$40,000.00	
Add: Salary due H. L. McConnell to Oct. 1st.....	440.00	
	$40,440.00	
Deduct: Loss to Oct. 10, 1899.....	741.05	
Amount due partners.....		$39,698.95

The above item, $39,698, will shrink $7,000 by additional costs on voyages and by sale accounts to come.

(Signed) A. W. JONES.

165

"Exhibit B."

AN AGREEMENT by and between the UNITED FRUIT COMPANY, incorporated under the laws of New Jersey of the one part, and J. B. CAMORS, HERBERT L. MCCONNELL, RUDOLF BRADEN and LOUIS WEINBERGER (herein called the stockholders) of the other part.

WHEREAS, the stockholders are the holders of all the capital stock of the Camors-McConnell Company (herein called the Camors Company), which

166 is engaged in the business of growing, transporting and selling tropical fruit, and the United Fruit Company is also largely engaged in similar business.

NOW, THEREFORE, in consideration of the premises and of the mutual agreement hereof, it is hereby agreed as follows:

1st. The United Fruit Company agrees that the Camors Company may import from the Bocas del Toro, Colombia, into the United States such amounts of bananas, cocoanuts and other tropical
167 fruit as can be carried in two steamers, each of the carrying capacity of about twenty or twenty-two thousand bunches of bananas, or at the option of the Camors Company, in three steamers of no greater aggregate carrying capacity than that of the said two steamers above provided for, and which the Camors Company shall be entitled to substitute for such two large steamers, and the said United Fruit Company agrees that after it has completed its own cargoes to an aggregate amount of not exceeding one hundred and twenty thousand stems per month of four weeks for its own ships operated by it to Bocas del Toro, it will fur-
168 nish bananas of good average quality in quantity sufficient to complete the cargoes of and fill the steamers of the said Camors Company above described at prices to be agreed upon between the resident managers of the United Fruit Company and the said Camors Company, but the same not to exceed twenty-five cents in the United States currency per bunch of first delivered alongside the steamer. It is further agreed that the said resident manager of the said Camors Company shall be such person as the stockholders above named or the owners of a majority of their stock in the said Camors Company shall designate so long as he

performs his duties and obeys the mandates or the board of directors. 169

2nd. The United Fruit Company agrees that it will not, without the consent of a majority in interest of the above named stockholders, send any bunches of bananas through Northern ports containing less than seven hands into any of the markets reached by the fruit of the Camors Company.

Further restrictions on imports to Southern ports may be made upon a proportionate basis mutually agreed upon by the following importers, namely, the United Fruit Company, the Bluefields Steamship Company, Limited, Camors-Weinberger 170
Banana Company, Limited, Orr-Laubenheimer Company and the Camors-McConnell Company, and when so made shall be binding and respected. And the amounts of imports above prescribed may be increased proportionately for the said United Fruit Company and the Camors-McConnell Company upon the consent of the United Fruit Company and a majority of the above named stockholders, who hold the shares of stock which are retained by Camors-McConnell Company pursuant to contract.

3d. Rules for the classification and prices of 171
fruit at port of shipment shall be mutually agreed upon by resident managers of the United Fruit Company and the Camors Company, and the same classification shall govern so far as possible in the sale of the same fruit.

4th. Uniform rates for freight and the carriage of passengers shall be agreed upon by the United Fruit Company and the Camors Company to apply to all steamers of the said two companies plying between the same or competitive points excepting from the operation hereof such present

existing contracts as shall be filed by the contracting parties by delivering a sworn copy of the original in each case to the other of the last said companies respectively.

5th. This contract shall remain in force for ten years from this date unless sooner modified by the consent of the parties.

IN WITNESS WHEREOF, the United Fruit Company has caused these presents to be executed in its name and behalf by its duly authorized officers, and the said stockholders have hereto set their hands and seals this 8th day of December, 1899.

UNITED FRUIT COMPANY,
By MINOR C. KEITH, First Vice President.
B. W. PALMER, Secretary.
H. L. MCCONNELL,
LOUIS WEINBERGER,
RUDOLPH BRADEN.

"Exhibit C."

AN AGREEMENT made by and between the FRUIT DISPATCH COMPANY, incorporated under the laws of New Jersey, of the one part, and the CAMORS MCCONNELL COMPANY, incorporated under the laws of New Jersey (hereinafter call (called) the Camors Company), of the other part.

WHEREAS, the Camors Company is engaged in growing, importing into the United States and selling tropical fruit and the Fruit Dispatch Company is formed for the purpose of, and is engaged in, handling and selling such fruit.

NOW, THEREOF, in consideration of the premises and of the mutual agreements herein contained, it is hereby agreed and declared as follows: 175

1st. The Camors Company hereby appoints the Fruit Dispatch Company its sole and exclusive agent to sell all fruit imported by the Camors Company from Bocas Del Toro in Colombia or elsewhere, to New Orleans, in Louisiana, or Mobile, in Alabama, or elsewhere.

2nd. All fruit of the Camors Company shall be sold to best advantage free on board cars at New Orleans or Mobile or other port of entry under the direction of two competent persons, one selected by the manager of the Camors Company (whose services shall be paid for by the Fruit Dispatch Company at such amount as the Camors Company and the Fruit Dispatch Company shall agree), and all fruit so unsold by them shall be shipped or consigned by said Dispatch Company for sale for account of said Camors Company to such points as said two persons shall designate and be handled as they may direct. 176

3rd. Payments for the fruits sold by or through the Fruit Dispatch Company shall be made during each calendar week for all sales completed during the preceding calendar week. The Fruit Dispatch Company shall charge five per cent. on the selling price for all fruit sold by or through it. 177

4th. This contract shall remain in force until December 8th, 1909, unless sooner modified by the consent of the parties.

IN WITNESS WHEREOF, the parties have caused these presents to be signed by their respective of-

178 ficers thereto duly authorized this 27th day of January, 1900.

FRUIT DISPATCH COMPANY,
By A. W. PRESTON, President.
CAMORS MCCONNELL,
By B. W. PALMER, President.

Attest:
FRANK HENDRICK, Secty.

(Endorsed)—United States District Court, Southern District of New York.—American Banana Company, Complainant, against United Fruit Company, Defendant. — Answer. — Strong &
179 Cadwalader, Attorneys for the Defendant, No. 40 Wall Street, New York City.—U. S. Circuit Court, Southern District of N. Y.—Filed Nov. 2, 1906.—John A. Shields, Clerk.

(Endorsed)—United States Circuit Court, Southern District of New York.—American Banana Company, Plaintiff, against United Fruit Company, Defendant.—Copy.—Answer to Amendment.—Strong & Cadwalader, Attorneys for Defendant, No. 40 Wall Street, New York City.—U. S. Circuit Court, Southern District of N. Y.—Filed Dec. 31, 1907.—John
180 A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 181

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

UNITED FRUIT COMPANY,
Defendant.

182

Whereas the original complaint in the above-entitled action having been amended by order of this Court, dated March 9, 1908, and filed in the office of the Clerk of this Court on March 12, 1908, said amended complaint being filed in the office of said Clerk on the 20th day of March, 1908, now, in order to complete the record for the purposes of the judgment roll about to be made up, it is

Stipulated between the attorneys for the parties hereto, that the answer of the defendant, filed in the office of the said Clerk, on the 3d day of November, 1906, and the amended answer filed in the office of the said Clerk on the 31st day of December, 1907, be deemed and taken to be the answer of the defendant to the said amended complaint, filed in the office of the said Clerk, as aforesaid, with the same force and effect as if the same had actually been filed subsequent to the said amended complaint. 183

Dated New York, March 27, 1908.

WHEELER, CORTIS & HAIGHT,
Attorneys for Plaintiff,
STRONG & CADWALADER,
Attorneys for Defendant.

184 At a Stated Term of the United States Circuit Court for the Southern District of New York, held in the Post Office Building in said District, on the 9th day of March, 1908.

Present—Hon. CHARLES M. HOUGH,
District Judge.

AMERICAN BANANA COMPANY,
Plaintiff,

185 AGAINST

UNITED FRUIT COMPANY,
Defendant.

The plaintiff having moved at the trial herein for an order amending the complaint in certain particulars, and said motion having been argued by Mr. Everett P. Wheeler, of counsel for plaintiff, in support thereof, and Mr. Henry W. Taft, of counsel for defendant, opposed, now on reading and filing the notice of motion dated March 6,
186 1908, the affidavit of John W. Griffin, verified March 6, 1908, and the plaintiff's proposed amendments, and the affidavit of Hugh A. Bayne, submitted by the defendant in opposition to the motion,

Now on motion of Wheeler, Cortis & Haight, attorneys for the plaintiff herein, it is

Ordered that the complaint herein be and the same hereby is amended by changing the first, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth and thirty-seventh articles thereof so as to read in conformity with the articles bearing those

numbers respectively, which are hereto annexed 187
and marked Exhibit A, and that the allegation of the date of the statute of Costa Rica mentioned in article twenty-nine be changed from April 1, 1905, to April 1, 1896. And it is further

Ordered that if the parties herein do hereafter file in the office of the clerk of this Court a stipulation setting forth a statement as to the proceedings alleged in the twenty-ninth article of the complaint, thereupon an order may be entered amending said article in conformity with said statement, such amendment to be as of the date of this order. And it is further

Ordered that the proposed amendments to articles 188
twenty-nine and thirty-one of the complaint, copies of which are hereto annexed and marked Exhibit B, be and the same hereby are denied. And it is further

Ordered that the thirty-second article of the complaint be stricken therefrom. And let the complaint as amended by this order be filed as a substitute for the original complaint.

C. M. HOUGH,
D. J.

Exhibit A. 189

PROPOSED AMENDMENTS.

FIRST.—The above named plaintiff, the American Banana Company, since about June 18, 1904, has been and still is a corporation duly organized and existing under the laws of the State of Alabama, and a citizen of the State of Alabama—formed for the purpose of carrying on the business of buying and growing bananas in the Republics of Central America and importing them into the United States and there selling them and for carry-

190 ing on such other operations as might be incidental to said business.

TWENTY-SIXTH.—In June, 1904, the plaintiff, as a part of its business aforesaid, purchased from said Herbert L. McConnell the said plantation and his said concession, and he conveyed the same to it, and it continued the development thereof and the construction of the said railway and of a pier at the seaboard end thereof at Gadocan, and expended in the purchase and development of said plantation more than $480,000. The same McConnell became President of this plaintiff at its organization, and
191 continued so to be down to the first day of September, 1905, and has been since the plaintiff's organization, and still is a stockholder of the plaintiff.

TWENTY-SEVENTH.—In July, 1904, plaintiff was in peaceable and undisturbed possession of its banana plantation and was building its railway and pier as under the laws of the Republic of Panama it had the right to do. Said plantation and railway were within the territorial limits of said Republic as fixed by its Constitution. The territorial independence of said Republic had been guaranteed by the United States of America.
192 Nevertheless, in said month of July, 1904, Costa Rican soldiers and officials were instigated and induced by said defendant company, as plaintiff is informed and believes, to seize, and they did in fact seize, the portion of the plantation of the plaintiff herein lying on the northerly side of the Sixiola River which flowed through said plantation, and a cargo of railroad and other supplies which had been landed from a vessel chartered by the said McConnell for the plaintiff,—the steamship *Ora*, under the superintendence of Panama Customs officials. On information and belief the defendant attempted to induce and did induce said soldiers

and officials to hold, and they have held, said goods 193
so landed, and occupied said northerly portion of the plantation of the plaintiff ever since; and to stop, and they have stopped, the construction and operation of the said plantation, railway, and the piers at said port of Gadocan, which afforded the only practicable mode of ingress to or egress from the said plantation, being the only port to which the plaintiff could bring supplies, or from which it could export the bananas grown on any part of said plantation, and they have prevented the importation of supplies for said plantation and railway and the export of bananas therefrom, and they hold said goods and plantation at the present time and 194
prevent the plaintiff from carrying on the trade of exporting bananas and other tropical fruits from said plantation and district to the United States of America. The land to the south of said plantation and between it and the port of Bocas del Toro in the Republic of Panama is crossed by large rivers and is in large part a dense swamp and jungle, and part of it belongs to defendant, and the construction of a railway through it from plaintiff's said plantation to said Bocas is and always has been impracticable.

TWENTY-EIGHTH.—Amend this article by substi- 195
tuting for the words "statute of Costa Rica, passed April 1, 1898," the words "statute of Costa Rica, passed April 1, 1896."

THIRTIETH.—The sole object of the defendant in buying up said alleged title was to prevent the plaintiff from operating its said plantation or any part thereof, and from having any outlet for the bananas and other fruit produced thereon, and it was done in pursuance of the contracts, combinations and conspiracies aforesaid.

196 THIRTY-SEVENTH.—From the time plaintiff acquired the ownership of said plantation it has produced large crops of bananas monthly, and on or about October 1, 1905, the plantation came into full bearing, but through the acts and conduct aforesaid of the defendant herein, plaintiff has been wholly deprived of the use of said plantation or any part thereof in its said business, and has been prevented from gathering and marketing the product of any part of said plantation. Said plaintiff has been prevented from buying any bananas from other banana plantations because said banana market for export was wholly con-
197 trolled by said defendant, and those contracting, combining and conspiring with it, and was thereby prevented from exporting the same and selling the same at its net value in the United States separately and in combination with its own fruit, and has thereby suffered additional damage. And said plaintiff has suffered great damages to its said railway and the right of way thereof, and the supplies sent to construct it, and to its floating equipment and plantation because it has not been allowed to go on with its work and business aforesaid, all to its damage in the sum of two million dollars.

198 ———

Exhibit B.

PROPOSED AMENDMENTS.

TWENTY-NINTH.—On or about May 13, 1904, an attempt was made by said Astua, at the instance of defendant and for its benefit, to continue such denouncement proceedings, but such attempt was in violation of said law of April 1, 1896, and was void. Such denouncement also in its actual description did not cover the plantation of the plain-

tiff, and could not legally have covered it, since all 199
of the plaintiff's plantation is within one mile of navigable seas or rivers. Nevertheless, on or about August 1st, 1904, said Astua procured a preliminary declaration from a certain court in Costa Rica known as the Court of Contencioso Administrativo, that the land on which was situated the portion of plaintiff's plantation lying on the northerly side of the River Sixola, by virtue of said denouncement belonged to him and his associates. Said proceedings were *ex parte* and without notice to this plaintiff, and said land was not within the jurisdiction of said court or of the Republic of Costa Rica, and said proceedings were unlawful 200
and void. Nevertheless, in order more fully to carry out the said combination and conspiracy, and to drive this plaintiff out of business, on or about August 30, 1904, the said Astua and his associates, at the instance of the defendant herein, and in its interest, transferred all their rights in said alleged denouncement to John M. Keith, manager in Costa Rica of the defendant, certain infant children of said Keith; Minor C. Keith, vice-president of the defendant; Mariano Guardia, a bookkeeper employed by the said Northern Railway Company; E. J. Hitchcock, auditor and general manager of the San Jose office of said Northern Railway Com- 201
pany; Manuel Montejo, D. A. Johnston and Felix Echeverria, the three persons last mentioned being employed by the said Northern Railway Company as bookkeepers, stenographers, or in similar capacities. On information and belief, said alleged rights were afterwards transferred to said Northern Railway Company of Costa Rica, which was and is a corporation, all of whose capital stock then was and still is owned by the defendant. Said proceedings were instituted and conducted at the instance of defendant, and each of the several persons aforesaid, and the said Northern Railway

202 Company acted as the agent therein of the defendant, who was the real party in interest, and thereupon a provisional order was made by said Court on the 26th day of January, 1906, awarding to the Northern Railway of Costa Rica possession of said land described in said denouncement proceedings, which defendant and its associate, the Northern Railway of Costa Rica, claimed included the land on the northerly bank of the Sixola, which has been cultivated by plaintiff. By the law of Costa Rica, said award would not take effect until it should be approved by the Department of State for the Treasury of Costa Rica. As a condition precedent
203 to such approval, the defendant was required by the Costa Rican government to give, and did in fact execute and deliver to said government on or about March 10, 1906, a bond of indemnity in and by which the defendant agreed to and did take upon itself the pecuniary responsibility of whatever kind and whatever amount which might be collected from the government of Costa Rica upon the claim of this plaintiff in respect to the said lands or the occupation thereof, and of said railway, and plaintiff's various property, business and other rights there.

Thereupon said government did approve said
204 provisional award, and in pursuance thereof and shortly after the commencement of this suit, said Northern Railway of Costa Rica did take possession of all the land which had been as aforesaid cultivated and improved by plaintiff upon the northerly bank of the Sixola River, and also plaintiff's said unfinished railway and right of way therefrom to Gadocan.

The judgment finally rendered in said proceedings was expressed to be "without prejudice to the rights of third parties which Mr. McConnell or any other person or corporation which represents him, or may be cessionary of his rights, may have con-

cerning the cultivations and other improvements," upon the land aforesaid, which was that cultivated by plaintiff on the northerly bank of the Sixola River. 205

THIRTY-FIRST.—This plaintiff since such unlawful interference with its banana plantation and business has been diligent to induce the Government of the United States to interfere on its behalf and induce the Government of Costa Rica to withdraw said soldiers and officials so that plaintiff might peaceably continue its business of exporting bananas and other tropical fruit to the United States. But defendant, both before the Department of State of the United States and before the Government of Costa Rica, has opposed and thwarted said efforts of the plaintiff, and has urged the United States to refrain from interfering in the premises, and has urged the Government of Costa Rica to direct the continuance of such forcible seizure and occupation of plaintiff's plantation, railway and other property, and as plaintiff is informed and believes, has instigated and induced certain officials of the Government of Costa Rica to continue such forcible seizure and occupation, and they have, by direction of the said Government of Costa Rica, continued down to the commencement of this suit, such forcible seizure and occupation of the plantation on the north side of the Sixola River and the railway and pier aforesaid, and have thereby prevented the plaintiff from exporting to the United States the bananas grown by it on any part of its plantation. 206 207

(Endorsed)—United States Circuit Court, Southern District of New York.—American Banana Company, Plaintiff, against United Fruit Company, Defendant.—Order and Notice of Settlement.—Wheeler, Cortis & Haight, Attorneys for Plaintiff, 21 State Street, New York,

208 N. Y.—A copy of the within paper received this day Mar. 9, 1908, Strong & Cadwalader, Attys. for deft.—U. S. Circuit Court, Southern District of N. Y.—Filed Mar. 11, 1908.—John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New, on Monday,
209 the second day of March, in the year of our Lord one thousand nine hundred and eight.

Present—The Honorable CHARLES M. HOUGH,
Circuit Judge.

AMERICAN BANANA COMPANY
vs.
UNITED FRUIT COMPANY.

210 Comes now the plaintiff aforesaid by Everett P. Wheeler, Esq., and moves the trial of this action. Likewise comes the defendant aforesaid by Henry W. Taft, Esq., its attorney. Thereupon a jury was duly impanelled and the cause proceeds.

MONDAY, MARCH 9, 1908.

Motion of defendant to dismiss bill of complaint granted.

Exception to plaintiff.

An extract from the minutes.

JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT, 211

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

UNITED FRUIT COMPANY,
Defendant.

The issues in this action having been brought on 212
for trial before the Hon. Charles M. Hough, District Judge, and a jury, at a Stated Term of this Court, held on the 2d day of March, 1908, at the Post Office Building, Borough of Manhattan, City of New York, and the jury having been duly impanelled and sworn, and a motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action having been made by the defendant and argued by counsel for the parties, and the Court having directed that the complaint be dismissed upon the merits and judgment rendered for the defendant, and the costs of the defendant having been taxed at $41.40, 213

Now, on motion of Strong & Cadwalader, attorneys for the defendants, it is

Adjudged that the complaint be and the same is hereby dismissed upon the merits; and that defendant recover of the plaintiff its costs as taxed and have execution therefor.

Dated New York, March 25, 1908.

JOHN A. SHIELDS,
Clerk.

214 CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY

vs.

UNITED FRUIT COMPANY.

ON DEFENDANT'S MOTION FOR JUDGMENT ON THE
215 PLEADINGS.

WHEELER, CORTIS & HAIGHT, and HORACE E. DEMING for Plaintiff.

MOORFIELD STOREY and HENRY W. TAFT for Defendant and motion.

HOUGH, *D. J.*:

For the purposes of this motion it will be assumed that the allegations of the complaint show the following facts to be either well pleaded or capable of judicial cognizance:

In June, 1904, there existed in the United States
216 a combination in restraint of trade or commerce in bananas with foreign nations, and defendant was an active party in and to such combination.

At the same time defendant was either monopolizing or attempting to monopolize trade or commerce in bananas with foreign nations. By these assumptions it is not intended to intimate any opinion as to the sufficiency of all the allegations in respect of combination or monopoly.

On March 30, 1899 (the alleged date of the organization of defendant), and continuously since that time, the plaintiff has been a corporation duly organized and existing under the laws of Alabama

and formed for the purpose of importing bananas 217
into the United States from Central and South America; this is the only business of the plaintiff shown in the complaint.

In June, 1904, one McConnell was in peaceable possession of a certain plantation, which was and is wholly situated within the boundaries of the Republic of Panama, as previously delimited by the arbitration of President Loubet of France.

Prior to June, 1904, plaintiff had not actually engaged in the banana business, or any productive business whatever. In that month and year it acquired McConnell's rights to his plantation, as also his right to construct and intention to build a rail- 218
way, to bring the produce of said plantation to tide water. At that time McConnell had a grant or concession from the Republic of Panama or its predecessor sovereign, to construct said railway, which concession was assignable and actually assigned. Later in 1904 the Executive Department of the Government of Costa Rica, acting through officials (either military or civil) and soldiers in its service, forcibly ejected plaintiff from the plantation in question, or the most important portion thereof, and seized *vi et armis* plaintiff's personal property situated there or thereabouts including especially the material for the construction of the 219
aforesaid railroad. Such ejection of plaintiff from the real estate in question, and such seizure of personalty was perpetrated by the Costa Rican officials and soldiers aforesaid at the instigation, suggestion and procurement of defendant, and for the purpose of preventing plaintiff from reaping the fruits of its investment in land and personalty, and in order to prevent it from harvesting bananas from its plantation and transporting the same to the United States in competition with defendant's own importations.

Whether or not an order for the seizure afore-

220 said was given by the supreme governmental authority of Costa Rica before seizure made, the conduct of said soldiers and officials was approved and ratified by the Government of Costa Rica, and the seizure and occupation aforesaid continued by the authority of said Government down to the time of the beginning of this suit.

Before the transfer of the plantation in question to plaintiff, a certain action had been begun in a court of Costa Rica seeking to establish title to the plantation in question, or to the most important portion thereof, in one Astua, a citizen of Costa Rica. In that suit such proceedings were
221 had that after said transfer of the said plantation a judgment or decree was entered declaring title to be in said Astua. Such judicial proceedings were taken at the instigation or for the benefit of this defendant with the purpose of preventing plaintiff from gathering bananas from the land in question and exporting them to the United States in competition with defendant's importa, and shortly after said decree passed Astua's title was transferred to a corporation allied with and controlled by defendant and identified with the unlawful combination and monopoly aforesaid.

Said proceedings of the civil or military officials of Costa Rica, of the soldiers of that Government
222 and of the court thereof, were taken in pursuance of an asserted right of sovereignty over the plantation in question, or the principal portion thereof, and over the land on which the plaintiff's personal property aforesaid was physically situated; and such assertion of sovereignty so as aforesaid made is irreconcilable with the delineation of boundaries between Panama and Costa Rica so made as aforesaid by President Loubet in pursuance of an international arbitration agreement.

Despite protests from the Department of State of the United States, made to the Government of

the Republic of Panama; Costa Rica down to the 223
time of the beginning of this suit mainained *de facto* jurisdiction and sovereignty over the plantation in question and the land on which the seizure of said personal property was made.

By reason of the facts so assumed for the purposes of this motion, plaintiff has never exported, gathered, cut or harvested any bananas from the plantation in question, and has never as matter of fact at any time entered upon or engaged in trade or commerce in bananas.

Both Costa Rica and Panama are sovereign independent nations, and were so at all the times in the complaint mentioned. The action of Costa Rica 224
constituted an invasion of the territorial rights of Panama, in which invasion, however, Panama has acquiesced down to the time of the beginning of this action, and the fact of such acquiescence in the *de facto* sovereignty of Costa Rica over the premises in question has been recognized by the Department of State of the United States.

For the purpose of preventing competition in the exportation of bananas from Costa Rica and Panama the defendant, by outbidding all other competitors, has secured long term contracts with most if not all of the producers of this fruit in that region. Defendant has also caused to be established 225
a transportation line between ports of the United States and the region where this plantation lies. Such transportation line holds itself out as a common carrier, it has refused to accept from this plaintiff lawful merchandise, and when it did not so refuse charged the plaintiff higher rates for its service as common carrier than it charged other persons and corporations similarly situated; and, finally, defendant has sought to cripple and embarrass plaintiff in its attempted or intended business operations by enticing away its employees and threatening to discharge from its own service such

226 of its workmen as became interested financially in plaintiff's enterprise.

I believe the foregoing constitutes an interpretation of the complaint as favorable to the plaintiff as could be asked upon a general demurrer.

In arriving at the foregoing statement of plaintiff's position, I have examined the certified copy produced of Secretary Root's letter dated April 16, 1906, being of the opinion that this official document constitutes a statement of the position of our own Government upon a political and non-judicial
227 question, and is therefore open to judicial cognizance within *Jones* vs. *United States, 137 U. S., 202,* approved in *Paquete Habana, 175 U. S., 696.* The communications from Governor Magoon also handed up at the hearing have not been regarded, as they contain no more than information concerning the attitude of foreign Governments which might or might not be accepted by our own Secretary of State.

I.—The important question of law presented by the above statement is whether any damages can be recovered or any action brought in this Court
228 for the ejection of plaintiff from its plantation and the seizure of its personal property.

Plaintiff asserts as the first step in establishing its demands that this Court must hold that the property was in Panama; that being established, the seizure and ejection becomes as unauthorized as the acts of a Sheriff outside his bailiwick when armed only with local process,—and it follows that defendant as a joint tort feasor is liable equally with the offending Costa Ricans.

Let it be assumed that a tort was committed, that such tort is within the purview of Section 7 of the

Sherman Act, that both this defendant and the 229
Costa Rican officials would be liable to civil suit were such tortious act committed in the United States, and that the cause of action is transitory—the inquiry still remains, Who actually deprived plaintiff of its property?

The answer is clear—the Republic of Costa Rica, by either originally directing or subsequently ratifying the acts of certain executive officers.

The ratification is equivalent to prior authorization, on which point *Buron* vs. *Denman*, 2 Ex., 167, is sufficient authority. This case was not overruled or doubted in *Baird* vs. *Walker*, L. R., 1892, App. Cases 491. The sole question in this later 230
judgment was whether an officer of the Crown could by virtue of some treaty obligation entered into after another subject acquired property rights, destroy such fellow-subject's property without being answerable therefor.

If the act complained of was done by Costa Rica, it is of no moment that the defendant and that Republic were joint tort feasors. There was but one tort, and if one offender can be sued it is of the essence of the doctrine that the other must be equally suable. But neither Costa Rica nor its officers could be brought into our courts, for reasons fully and forcibly set forth by Wallace, *J.*, in 231
Underhill vs. *Hernandez*, 65 Fed. Rep., 581, affirmed in 162 U. S., 250.

No opinion is here expressed as to whether the cause of action be local or not, or whether within the reasonable interpretation of Section 7 the act of seizure was "anything forbidden or declared to be unlawful" by the Sherman Act. The case last cited renders the plaintiff's claim untenable by civil action in any American Court, and on grounds of the highest public policy. It is impossible to adjudicate this matter without sitting in judgment on the *right* of Costa Rica to do what was done.

232 The defendant's malice, intention or profit is no more important than are similar considerations in an action for false arrest—before the illegality of the arrest be demonstrated. There as here it is of the absence of the Court's jurisdictional power to determine the validity and legality of the governmental action out of which the suit grows—and this Court has no power to sit in judgment on the validity or legality of the act of any sovereign independent nation.

II.—The complainant specifically demands as damages prospective profits—profits that would
233 flowed from the uninterrupted enjoyment of its plantation and railway, and to be obtained by harvesting (in years after 1904) its ripened crops, exporting the same to the United States and there selling bananas without the monopolistic oppression or competition of defendant.

If this Court cannot give judgment on the validity of the original taking of the plantation, it certainly cannot award damages for the result of the taking.

But apart from that difficulty, it appears that never did plaintiff enjoy or possess any trade or commerce in bananas from the plantation in ques-
234 tion; and remembering that this is an action under the Sherman law, I remain of the opinion that that statute gives no right of action to one who is not deprived of his existing profits, trade or commerce by the formation or action of an unlawful combination or monopoly—but merely prevented from embarking upon a new enterprise by the threatening aspect of an already existing monopoly or combination (*Thomsen* vs. *Union Castle S. S. Co.*, 149 Fed. Rep., 933). And this is in accord with the general rule of speculative damages, especially in actions or tort (*Dudley* vs. *Briggs*, 141 Mass., 582).

A citizen who found a desirable avenue of busi-

ness activity closed for reasons obnoxious to the 235
Sherman Act may pray the Department of Justice to remove the unlawful obstruction, but he has suffered no actual pecuniary damage by being thwarted in what he would like to do at some future time.

III.—Plaintiff further shows that the banana market of Central America, or some portion thereof, has been closed to it because defendant offered higher prices to producers than did anyone else, and so obtained long contracts for the exclusive purchase of their product. I fail to see that this procedure, so beneficial to the producer, is obnoxi- 236
ous to any section of the statute in question, even if the transactions occurred in the United States. It is still more difficult to conceive how the procedure which affects bananas growing in Central America can be said to be affected by any law passed in pursuance of a power to regulate commerce with foreign nations and between the several States.

IV.—It is further shown that defendant has enticed or sought to entice away plaintiff's employees, and oppressed, or sought to oppress, such of its own employees as presumed to buy stock in plain- 237
tiff's Company. These proceedings, however unfair and immoral, are not in and of themselves forbidden or declared to be unlawful by the Sherman Act, and I do not think that a cause of action can be built upon this procedure alone. I cannot regard it as more than a statement of evidence, which may well be used in explaining or proving the operation if not the formation of the alleged combination and monopoly.

V.—Plaintiff's case finally rests upon the statement that defendant's transportation line, while

238 acting as a common carrier, discriminated against plaintiff.

The really serious question raised by this motion should in fairness have been long ago presented by demurrer, and on this motion plaintiff is entitled to great laxity in interpreting its pleadings.

Regarded as an independent cause of action, I greatly doubt whether it is sufficiently pleaded. Yet it is true that although the plaintiff never harvested nor exported the bananas, it had a business by way of preparation. It expended considerable money in its Central American plant; it was engaged in foreign commerce when it began to move
239 men, material and supplies to and from the United States and Central American ports, and if the plaintiff so elects I will hear testimony on this point.

This opinion is filed several days before March 9th in order that counsel may have an opportunity to consider it and decide before the opening of Court on that day whether, inasmuch as rulings in accordance herewith will exclude from the consideration of the jury the substantial case which plaintiff has intended to present, it be not advisable to permit judgment to go for the defendant, that the correctness of the views here expressed
240 may be tested in the appellate court promptly and at small expense.

C. M. HOUGH,
U. S. J.

March 4, 1908.

(Endorsed)—United States Circuit Court, Southern District of N. Y.—American Banana Company *vs.* United Fruit Company.—Opinion. Hough, *D. J.* March 4, 1908.—U. S. Circuit Court, Southern District of N. Y.—Filed Mar. 4, 1908.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 241

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

UNITED FRUIT COMPANY,
Defendant.

242 Afterwards, to wit, at a Circuit Court, held at the United States Court House, in the County of New York, in said district, on the 2d and 9th days of March, in the year one thousand nine hundred and eight (1908), before the Hon. Charles M. Hough, one of the judges of this Court, appointed to hold said Circuit Court according to law, the aforesaid issues so joined between the said parties came on to be tried by jury of said district for that purpose duly impanelled.

At which day came there as well the said plaintiff as the said defendant, by their respective attorneys aforesaid; and the jurors of the jury afore- 243 said, impanelled to try the said issues, being called also came, and were then and there in due manner chosen and sworn to try with said issues. Mr. E. P. Wheeler, Mr. H. E. Deming, Mr. C. B. Smith and Mr. J. W. Griffin appeared as counsel for the plaintiff; Mr. Moorefield Storey, Mr. H. W. Taft, Mr. W. B. Spencer, Mr. Hugh A. Bayne and Mr. Eugene W. Ong appeared as counsel for the defendant.

And thereupon the counsel for the defendant moved the Court that the complaint be dismissed on the merits on the ground that the complaint did

244 not state facts sufficient to constitute a cause of action, and the counsel for the plaintiff claimed that pursuant to the 7th amendment to the Constitution of the United States the plaintiff was entitled to a trial by jury of the said issues so joined, and that after the verdict of the jury upon the said issues, it would be for the Court to direct the judgment which should be entered, and that the plaintiff had a constitutional right to have the issues of fact tried by jury. The Court overruled the objection to the defendant's motion, and decided that the defendant had a right to move at that stage of the cause to dismiss the complaint on the ground
245 that it did not state facts sufficient to constitute a cause of action, to which ruling and decision the plaintiff duly excepted.

Thereupon the Court heard argument upon the said motion and reserved its decision.

And thereafter, on the 9th day of March, 1908, the Court announced its decision that the plaintiff was not entitled to prosecute an action in this Court for damages by reason of any of the acts alleged in the complaint, except as to the acts alleged in the 32d article of the complaint, and gave counsel for the plaintiff an opportunity to consider and decide whether, inasmuch as rulings in
246 accordance with said opinion would exclude the substantial case which the plaintiff had intended to present, it were not advisable to permit judgment to go for the defendant, in order to obtain promptly the judgment of the Appellate Court.

And thereupon the counsel for the plaintiff asked leave of the Court to amend the complaint, which motion the Court granted, and the complaint was accordingly amended in the manner stated in the schedule hereto annexed, marked "Amendments to complaint."

And thereupon the plaintiff drew the attention of the Court to the order heretofore made by the

Hon. E. H. Lacombe, one of the judges of this 247
Court, copy of which order is hereto annexed, directing the defendant to make discovery upon the trial of certain writings and documents in said order mentioned, and moved the Court to require the defendant forthwith to comply with the said order, which motion the Court denied, to which denial and to the refusal of the Court to require the defendant to make discovery, in pursuance of the terms of said order, the plaintiff then and there excepted. And thereupon the defendant renewed its motion that the Court direct judgment to be entered in favor of the defendant that the complaint be dismissed on the merits on the ground 248
that the complaint as amended did not state facts sufficient to constitute a cause of action. Before the Court ruled on said motion, the plaintiff moved that it be allowed to introduce evidence to the jury upon the issues of fact made by the complaint as amended and the answer, which motion then and there the Court denied, to which denial the plaintiff excepted.

And thereupon the Court ruled and decided that the defendant had a right to make its motion aforesaid at that stage of the cause, to which ruling and decision the plaintiff duly excepted; and thereupon the Court granted the defendant's motion afore- 249
said, to which decision the plaintiff duly excepted.

And thereupon the Court directed judgment to be entered in favor of the defendant that the complaint be dismissed on the merits on the ground that the amended complaint did not state facts sufficient to constitute a cause of action, to which direction the plaintiff then and there excepted, and the Court thereupon discharged the jury.

And the said counsel for the plaintiff did then and there propose their aforesaid exceptions to the opinion and decision of the said judge, and requested him to put his seal to this bill of excep-

250 tions, containing the said several matters as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said judge, at the request of the said counsel for the said plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided *nunc protunc* as of the 9th day of March, in the year of our Lord one thousand nine hundred and eight.

C. M. HOUGH,
D. J.

[SEAL.]

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251 **"Exhibit A."**

"Here follow the various amendments to the complaint, allowed by the order of March 9th, 1908, which order is printed herein at length."

TWENTY-EIGHTH.—This article amended by substituting for the words "statute of Costa Rica, passed April 1, 1898," the words "statute of Costa Rica, passed April 1, 1896."

TWENTY-NINTH.—This article amended by substituting for the words "said law of April 1, 1905," the words "said law of April 1, 1896."

252

At a Stated Term of the Circuit Court 253
of the United States for the Southern District of New York, held at its Court Rooms in the Post Office Building, County of New York, on the 16th day of February, 1907.

Present—Hon. E. HENRY LACOMBE, *Justice.*

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

254

UNITED FRUIT COMPANY,
Defendant.

On reading and filing the affidavits of Clarence Bishop Smith, verified respectively the 28th day of December, 1906, and the 11th day of January, 1907, and on reading the affidavit of Minor C. Keith, already filed, verified the 13th day of December, 1906, in support of the said motion; and on reading and filing the affidavit of Walker B. Spencer, verified the 18th day of January, 1907, in opposition thereto; and on all the pleadings and proceedings herein; after hearing Everett P. Wheeler, of counsel for the plaintiff, in support of said motion, and Henry W. Taft, of counsel for the defendant, opposed, and due deliberation having been had, now, on motion of Wheeler, Cortis & Haight, attorneys for the plaintiff, it is 255

Ordered that the defendant produce at the trial of this action the following writings, or such of them as were in defendant's possession or power on the 28th day of December, 1906, or have or may thereafter come into its possession and power; and that such production be authenticated by the oath

256 of some officer of defendant having knowledge of the facts:

1. Copies of the annual reports which the defendant has issued to its stockholders since its incorporation in the year 1899.

2. Also all books and all certificates of stock showing ownership by defendant, since its incorporation and up to September 10, 1906, of stock of the following companies, viz.: New Orleans, Belize, Royal Mail and Central American Steamship Company, Limited; S. Oteri, John G. Woods, Snyder Banana Company, The Boston Fruit Company,
257 Buckman Fruit Company, American Fruit Company, Quaker City Fruit Company, Banes Fruit Company, Dominican Fruit Company, Sama Fruit Company, Colombia Land Company, Limited, and the Northern Railroad Company of Costa Rica.

The foregoing paragraph shall be construed to include all stock standing in the name or names of any person or corporation other than the defendant, of which the defendant is or has been at any time between its incorporation and September 13, 1906, the true owner, or which at any time between said dates has been held on account of the defendant or in trust for the defendant, and also all stock
258 so standing at any of said times in the name of any person or corporation other than the defendant, which was put in said name at the defendant's order or request, or for which the defendant paid, or on which the defendant has at any of said times received dividends.

3. Also all books of account and all papers showing what assets the defendant acquired, at the time of its incorporation, or at any time thereafter prior to the commencement of this suit, from any of the companies named in the second paragraph of this order.

4. Also all books, documents and papers which 259
show the total amount and value of bananas imported by defendant company into the United States during the year ending June 30, 1901, and during each year ending June 30, down to and including June 30, 1906; and also all books, documents and papers which tend to show the total amount and value of bananas imported into the United States by each of the companies mentioned in clauses 9 and 10 of this order, and also by the Camors-McConnell Company during each of said years, so far as the books, documents and papers of said latter companies are within defendant's custody or control. 260

5. Also all statements or letters furnished by the defendant to E. H. Rollins & Sons, of Boston, as a basis for a certain statement issued in or about the year 1901 by said E. H. Rollins & Sons, of 19 Milk street, Boston, Massachusetts, in which said E. H. Rollins & Sons set forth the general condition of the defendant company and advertised the First Mortgage Five Per Cent. Sinking Fund Gold Bonds of the Northern Railroad Company of Costa Rica guaranteed by the defendant and said statement issued by E. H. Rollins & Sons.

6. Also a statement, or a copy of a statement, 261
furnished by the defendant to the Boston Stock Exchange, after its incorporation in 1899, at the time that it applied to the Boston Stock Exchange to be listed on the said Exchange.

7. Also all contracts between the defendant and the following persons, firms or corporations, by which said persons, firms or corporations agreed with the defendant not to engage longer in the banana trade, viz.: the persons, firms and corporations named in paragraph 2 of this order:

262 The foregoing shall be construed to include all contracts between said parties made in the past, whether or not said contracts are now claimed by the defendant to have been rescinded, and shall include copies of any of said contracts of which the originals may have been destroyed or lost.

8. Also all contracts made by defendant during the year 1899 and subsequent years, with the following persons or corporations, regulating the prices at which any or all of them should buy bananas, or the prices at which any or all of them should sell bananas in the United States, or the amounts any or all of them were to import into
263 the United States, viz.: The Camors-Weinberger Banana Company, Limited; The Orr & Laubenheimer Company, J. M. Ceballos & Company and Bluefields Steamship Company.

9. All contracts between the Fruit Dispatch Company and the following named persons and corporations, whereby such persons or corporations appointed said Fruit Dispatch Company their or its agent to sell bananas in the United States, viz.: Belize Royal Mail & Central American Steamship Company, Limited; S. Oteri, John G. Woods, Snyder Banana Company, The Boston Fruit Com-
264 pany, American Fruit Company, Quaker City Fruit Company, Buckman Fruit Company, Banes Fruit Company, Dominican Fruit Company, Sama Fruit Company, Colombia Land Company, Limited; The Camors-Weinberger Banana Company, Limited; The Orr & Laubenheimer Company, J. M. Ceballos & Company, and the Bluefields Steamship Company, whether such contracts or any of them are embodied in a formal agreement, or are contained in a group of documents, letters and papers con-constituting a contract. And also all documents, letters and papers modifying any contracts already made.

10. Also all contracts between the defendant and 265
each of the following persons or companies, which regulated in any respect the sale of bananas in the United States, or the amount to be imported, or the prices at which such fruit was to be purchased or sold: J. B. Cefalu & Brother, The Central American Steamship Company, Vacarro Brothers & Company, The Thacker Brothers Steamship Company of Mobile, and the Atlantic Fruit Company of Baltimore, whether such contracts or any of them are embodied in a formal agreement, or are contained in a group of documents, letters and papers constituting a contract. And also all documents, letters and papers modifying any contract already 266
made.

11. Also all notices, documents and papers showing the rates that defendant established for the carriage of cargo on steamers owned or chartered by it for the carrying of cargo to or from New Orleans and Mobile in the United States, and Bocas del Toro in Panama, between June 1, 1903, and September 10, 1906.

12. Also all contracts made by defendant with the producers of fruit at or in the neighborhood of Bocas del Toro, Panama, by which the defendant contracted for the purchase of fruit there. 267

13. Also all letters or cablegrams sent in June or July, 1904, by the defendant to Herbert Leer, in connection with the landing of the steamship Orn at Gadocan[illegible] Panama.

14. Also all letters or cablegrams sent between April, 1903, and June, 1904, and also between June, 1904, and December, 1904, sent by the defendant or any of its employees, attorneys, officers and agents to any of its employees, attorneys, of-

268 ficers and agents in Costa Rica and Panama and to the Government of Costa Rica or to any member thereof, and any replies received by them or any of them, showing what defendant did, promoted, authorized or ratified in reference to interference by the officials of the government of Costa Rica with the banana plantations of Herbert L. McConnell before his conveyance to the plaintiff, or in reference to the interference by such officials with said plantations after said conveyance to plaintiff.

And also with reference to the shipment by the steamship Orn, above referred to, of a certain cargo of railway supplies, belonging to Herbert L. Mc-
269 Connell, and to the interference by certain officials of the Costa Rican Government with the landing of said supplies, and with the establishment by the Costa Rican Government of a guard of the customs officials while she was at sea.

15. Also all books of account and other writings showing what payments were made by defendant to its agents in Costa Rica in 1904; and who said agents were.

16. Also all letters, telegrams and written correspondence and communications of any kind sent in or about July, 1904, by Victor Camors, an of-
270 ficial of the Camors-McConnell Company, to Minor C. Keith, the Vice-President of the defendant, informing him of the shipment of railway material on the steamship Orn, or in any way relating to said shipment, to interference past or prospective with said shipment, by the Costa Rican customs guard at Monkey Point, or at Gadocan, the destination of the said steamship, or in any way showing what the defendant did, permitted, authorized or ratified, with reference to the same material and in particular a certain letter written by Minor C. Keith, one of the officers of the defendant to Victor Camors, one of the officers of the Camors-McCon-

nell Company, mentioned in the deposition of 271
Thomas Jullum already taken herein.

17. Also all cable instructions, or copies of the cable instructions, which were sent by defendant or by any of its officers or agents to Ricardo Pacheco, one of its attorneys in Costa Rica, in or about May, 1905, in reference to the land on the Sixola River, mentioned in the complaint, and to the occupation thereof by plaintiff, and to defendant's claim to exclude the plaintiff therefrom. And it is further

Ordered that if the defendant is able to produce the originals of any of the foregoing, it shall 272
do so, but if it has not and did not have on the 28th day of December, 1906, in its possession or power, any of the documents or writings hereinbefore referred to, but did have in its possession or power copies of the same, that in each case it produce the copy, provided, however, that in lieu of producing the foregoing books of account the defendant may produce sworn copies of the entries therein which show the foregoing facts. And it is further

Ordered that the defendant shall have in court all the documents fairly within the above enumeration, and which would enable plaintiff to show
defendant's past conduct touching the matters 273
complained of herein. It will be no sufficient response to the order to state upon the trial that some contract, letter or what not manifestly material is not at hand, but is in Costa Rica, or elsewhere.

E. HENRY LACOMBE,
U. S. C. J.

(Endorsed)—United States Circuit Court, Southern Dist. of New York.—American Banana Company, Plaintiff, against United Fruit Company, Defendant.—Bill of Exceptions.—

274 Wheeler, Cortis & Haight, Attorneys for Plaintiff, 21 State Street, New York City, N. Y.—U. S. Circuit Court, Southern District of N. Y.—Filed Mar. 19, 1908.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY, 275 Plaintiff, AGAINST UNITED FRUIT COMPANY, Defendant.	Assignment of Errors.

Comes now the American Banana Company, plaintiff herein, and assigns error in the judgment in said cause as follows:

FIRST.—That the United States Circuit Court, for the Southern District of New York, erred in
276 overruling the objection taken by the plaintiff herein to the making by the defendant after the issues herein came on to be tried by jury, of a motion to dismiss the complaint herein, on the ground that it did not state facts sufficient to constitute a cause of action.

SECOND.—That said Court erred in not allowing the plaintiff to submit the issues herein to the jury for a verdict, said jury having been duly impanelled and sworn, and in not allowing the plaintiff to offer any evidence before said jury in support of the issues on its behalf.

THIRD.—That said Court erred in granting the motion made by the defendant to dismiss the complaint herein on the ground that it did not state facts sufficient to constitute a cause of action, and in directing judgment for the defendant on said ground. 277

FOURTH.—That said Court erred in holding that it ought to decline rendering judgment in this suit upon the issues because said judgment would involve passing judgment upon an act of the Republic of Costa Rica.

FIFTH.—That said Court erred in holding that a trial herein and judgment for the plaintiff herein would involve passing judgment on an act of the Republic of Costa Rica. 278

SIXTH.—That said Court erred in holding that it was of the essence of the doctrine of recovery against joint tort feasors that each must be equally suable.

SEVENTH.—That said Court erred in holding that it had no power to sit in judgment in an action between two citizens of the United States upon the validity or legality of the act of any sovereign independent nation. 279

EIGHTH.—That said Court erred in declining to hold that the effect of the Treaty between the United States of America and the Republic of Panama, mentioned in the complaint, and of the Constitution of said Republic, and of the award of the President of the French Republic, also therein mentioned, was to constitute the Republic of Panama the sovereign of the territory on the northerly bank of the Sixola River, which was occupied by plaintiff, and that, therefore, the acts in said territory

280 of the officials of Costa Rica were without authority.

NINTH.—That said Court erred in holding that the Act of Congress, approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," had no application to the business of the plaintiff herein.

TENTH.—That said Court erred in holding that said Act had no application to the acts charged in the complaint against the defendant herein.

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ELEVENTH.—That said Court erred in holding that said Act gives no right of action to one who is not deprived of his existing profits, trade or commerce by the formation or action of an unlawful combination or monopoly.

TWELFTH.—That said Court erred in holding that no cause of action exists under said Act against an American citizen who breaks up and destroys the business and trade of another American citizen before the profits thereof are realized, and prevents him from carrying on said business and trade to a profitable termination.

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THIRTEENTH.—That said Court erred in holding that under said Act the plaintiff had no cause of action against the defendant for the ejection from its plantation and the seizure and destruction of its real and personal property, alleged in the complaint, said acts having been procured and instigated by the defendant for the purpose of preventing the plaintiff from harvesting bananas upon its plantation and transporting them to the United States, and there selling them in competition with defendant.

FOURTEENTH.—That said Court erred in holding 283
that plaintiff could not recover in this action damages for the injury it suffered by reason of acts of the defendant done in Central America which closed the banana market there to it, in pursuance of the combination and conspiracy alleged in the complaint.

FIFTEENTH.—That said Court erred in holding that unless the acts of the Costa Rican officials, alleged in the complaint, were adjudged in themselves illegal, the defendant's malice, intention or profit were not material.

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SIXTEENTH.—That said Court erred in holding that the complaint herein did not state a cause of action against the defendant at common law.

SEVENTEENTH.—That said Court erred in limiting by construction the general language of said Act, and particularly of the seventh section thereof, and in not giving effect to the plain and obvious terms of said section.

EIGHTEENTH.—That said Court erred in not denying the said motion made by said defendant and ordering the trial to proceed.

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Wherefore said plaintiff prays that the judgment aforesaid may be reversed and set aside, and that such further proceedings may be had herein as are authorized by law and by the practice of the courts of the United States.

WHEELER, CORTIS & HAIGHT,
Attorneys for Plaintiff,
21 State Street,
New York City.

(Endorsed)—United States Circuit Court, Southern District of New York.—American Banana

286 Company, Plaintiff, against United Fruit Company, Defendant.—Assignment of Errors. —Wheeler, Cortis & Haight, Attorneys for Plaintiff, 21 State Street, New York City, N. Y.—U. S. Circuit Court, Southern District of N. Y.—Filed Mar. 27, 1908.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,

FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

287

AMERICAN BANANA COMPANY, Plaintiff,

AGAINST

UNITED FRUIT COMPANY, Defendant.

Bond for Damages and costs.

KNOW ALL MEN BY THESE PRESENTS: That the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty street, in the City of New York, County of New York, and State of New York, is held and firmly bound unto the above-named United Fruit Company, in the sum of Two Hundred and Ninety Dollars ($290), lawful money of the United States, to be paid to the said United Fruit Company, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

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Sealed with its seal, and dated this 27th day of March, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above-named American Banana 289
Company is about to take out a writ of error to the United States Circuit Court of Appeals, for the Second Circuit, to reverse the judgment rendered March 27, 1908, in the above-entitled suit, by the Judge of the Circuit Court of the United States, for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above-named American Banana Company shall prosecute its writ of error to effect, and answer all damages and costs, including costs already taxed against it in this Court, if it fails to make its plea good, then this obligation shall be void, otherwise the same shall be and re- 290
main in full force and virtue.

Sealed and delivered, taken and acknowledged this 27th day of March, 1908, before me

DANIEL C. DASCY,
Notary Public,
New York City.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN,
Manager.

[SEAL.]

Attest: 291

GEORGE E. HAYES,
Attorney-in-Fact.

292 AFFIDAVIT, ACKNOWLEDGMENT AND JUSTIFICATION BY THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

WE WILL BOND YOU.

[Vignette.]

Fidelity—Judicial—Burglary—Contract.

STATE OF NEW YORK, }
County of New York, } ss.:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of the United
293 States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of American Banana Company, as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted
294 as surety on bonds; that the seal affixed to the annexed bond of American Banana Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney in Fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority

of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars ($1,000,000). 295

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 27th day of March, 1908.

DANIEL C. DEASY,
[SEAL] Notary Public,
New York County.

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(Endorsed)—Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.—American Banana Company, Plaintiff, against United Fruit Company, Defendant.—Bond for damages and Costs.—Approved as to form, amount & sufficiency of Sureties. New York, March 27, 1908. Strong & Cadwalader, Attorneys for Defendant.—Approved as to form and also as to sufficiency of sureties, with reservant, however, to the defendants of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge. —Filed March 27, 1908.—U. S. Circuit Court, Southern District of New York.—John A. Shields, Clerk. 297

298 At a Stated Term of the United States Circuit Court for the Southern District of New York, held in the Court Rooms, Post Office Building, Borough of Manhattan, City of New York, on the 27 day of March, 1908.

Present—Hon. E. H. LACOMBE, *Judge.*

AMERICAN BANANA COMPANY,
Plaintiff,

299 AGAINST

UNITED FRUIT COMPANY,
Defendant.

On reading and filing the petition of the American Banana Company for a writ of error, which petition was duly filed in the office of the Clerk of this Court on the 27th day of March, 1908, and a writ of error having been allowed herein on said petition to the United States Circuit Court of Appeals for the Second Circuit, and a bond for security for costs and damages on said appeal, and
300 for costs heretofore taxed against the plaintiff in this court, having been filed by the plaintiff, it is

Ordered that said bond be and the same hereby is approved as to form, amount and sufficiency of surety; and it is further

Ordered that said security having been given by the plaintiff, all proceedings herein in this court be stayed until the determination by said Circuit Court of Appeals of the matters coming before it on said writ of error; and it is further

Ordered that the bond for costs, dated October

6, 1906, heretofore filed herein by the plaintiff, be 301
and the same hereby is cancelled.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed)—United States Circuit Court, Southern District of New York.—American Banana Company, Plaintiff, against United Fruit Company, Defendant.—Order of stay and notice of entry.—Wheeler, Cortis & Haight, Attorneys for Plaintiff, 21 State Street, New York City, N. Y.—Please take notice that an order of which the within is a copy, was this day duly entered in the office of the Clerk of the U. S. 302
Circuit Court for the Southern District of New York at his office in the City of New York. Dated New York, March 28, 1908, Yours, &c., Wheeler, Cortis & Haight, Attys. for plaintiff. —Service of a copy of the within order is hereby admitted this 28th day of Mch., 1908, Strong & Cadwalader, Attorneys for Deft.—U. S. Circuit Court, Southern District of N. Y.—Filed Mar. 28, 1908.—John A. Shields, Clerk.

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304 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

UNITED FRUIT COMPANY,
Defendant.

305 UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE UNITED FRUIT COMPANY, GREETING:

You are hereby cited and admonished to be and appear at a Term of the United States Circuit Court of Appeals for the Second Circuit, to be holden in the Post Office Building, Borough of Manhattan, City of New York, on the 17th day of April, 1908, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the American Banana Company is plain-
306 tiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated March 27, 1908.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed)—United States Circuit Court, Southern District of N. Y.—American Banana Company, Plaintiff, against United Fruit Company, Defendant.—Citation.—Wheeler, Cortis

& Haight, Attorneys for Plaintiff, 21 State 307
Street, New York City, N. Y.—Service of a copy of the within citation is hereby admitted this 28th day of March, 1908. Strong & Cadwalader, Attorneys for Deft.—U. S. Circuit Court, Southern District N. Y.—Filed Mar. 28, 1908.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

308

AMERICAN BANANA COMPANY,
Plaintiff,

AGAINST

UNITED FRUIT COMPANY,
Defendant.

It is hereby stipulated and agreed that in printing the record in the above case, the bill of costs may be omitted; that in printing the order of dis- 309
covery of Judge Lacombe as amended, which order is made part of the bill of exceptions, the word "following," contained in the first line of the second paragraph of the section numbered 2, be changed to "foregoing," and that the same correction be deemed to have been made in the original order;

And it is further stipulated and agreed that Exhibit A, attached to said bill of exceptions, being a list of the amendments to the complaint, allowed by the order of March 9, 1908, be omitted, and in place thereof there be printed the following words;

310 **"Exhibit A.**

"Here follow the various amendments to the complaint, allowed by the order of March 9, 1908, which order is printed herein at length."

And it is further stipulated and agreed that the amendment to the answer, served by the defendant on December 31, 1907, be omitted, and that in place thereof there be inserted in the answer, after paragraph twelve, the following:

"Twelve A: Answering the allegations contained in Paragraph Seventeen A of the complaint, this defendant admits that in October, 1899, defendant
311 acquired 200 shares of the capital stock of the Camors-Weinberger Banana Company; that in December, 1899, defendant acquired 50 shares of the capital stock of the Orr-Laubenheimer Company; that in June, 1901, defendant acquired 500 shares of the capital stock of the Bluefields Steamship Company, Limited; that in August, 1905, defendant acquired 180 shares of the capital stock of Thacker Brothers Company; and that in May, 1905, defendant acquired 1,260 shares of the capital stock of the Atlantic Fruit Company. The stocks so acquired by defendant were by it owned from the dates of their several acquisitions, as
312 aforesaid, until the commencement of this action.

Except as above admitted, defendant denies every allegation contained in said paragraph Seventeen A."

Dated New York, April 2, 1908.

WHEELER, CORTIS & HAIGHT,
Attorneys for Plaintiff.
STRONG & CADWALADER,
Attorneys for Defendant.

On the above stipulation it is so ordered.

E. H. LACOMBE,
U. S. C. J.

[28727]

United States Circuit Court of Appeals for the Second Circuit.

No. 65, October Term, 1908.

Argued October 23, 1908; Decided December 15, 1908.

THE AMERICAN BANANA COMPANY, Plaintiff in Error,
vs.
THE UNITED FRUIT COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Lacombe, Coxe and Noyes, Circuit Judges.

Error to the Circuit Court, Southern District of New York.

NOYES, *Circuit Judge:*

This is an action for the recovery of treble damages under the seventh section of the federal anti-trust statute.

The complaint alleges, in substance, that the defendant corporation was organized in 1899, and thereafter at all times engaged in the business of importing bananas into the United States from Central and South America; that in 1899 and subsequent years, for the purpose of monopolizing the banana trade between such countries, of regulating prices, controlling production and preventing competition, the defendant acquired the property and business of several competing corporations and individuals, entered into contracts regulating prices and restricting business with other competitors, acquired controlling stock interests in still others, and organized a common selling agent for all; that in April, 1903, one McConnell began to make a banana plantation upon the northerly bank of the Sixola River in Panama, then a part of the United States of Colombia, and to build a railway connecting said plantation with the nearest port and affording the only practicable means of access to the plantation; that said McConnell obtained the transfer of a concession to build such railroad from an official of the United States of Colombia who subsequently recommended to his government that Costa Rica be allowed to administer the territory through which it was to run notwithstanding such territory had previously been awarded to Colombia by an award of the President of France acting in accordance with a treaty between Colombia and Costa Rica; that in November, 1903, that part of the United States of Colombia known as the Department of Panama and including the territory in question revolted and became the Republic of Panama; that in June, 1904, the plaintiff corporation, which had been organized for the purpose of growing and buying bananas in Central America and importing them into the United States, purchased said plantation and

concession from McConnell, and spent large sums of money in the development of the plantation and construction of the railroad; that in July, 1904, Costa Rican soldiers and officials, instigated and induced by the defendant, seized a portion of the plaintiff's plantation and a cargo of supplies recently landed thereon; that said soldiers and officials have continued to forcibly occupy and hold said portion of said plantation, have stopped the construction and operation of said railroad and have wholly prevented the plaintiff from carrying on its business; that the plaintiff has endeavored to induce the government of Costa Rica to withdraw its soldiers and officials but such government has refused to do so; that the defendant has purchased an alleged title to the plaintiff's plantation and has instituted certain proceedings thereunder, and that the defendant and its associates have combined to prevent the sale of bananas to other exporters than themselves and have made such arrangements with growers that there is no market in which bananas can be purchased by the plaintiff for export.

The defendant answered and the case came on for trial when the defendant moved to dismiss the complaint upon the ground that it failed to state a cause of action. This motion was granted by the trial court and the plaintiff brings this writ of error.

The seventh section of the federal anti-trust statute, upon which this action is brought, provides that any person "injured in his business or property" by reason of anything forbidden or declared to be unlawful by the act may recover threefold damages. It is then of first importance to ascertain what actions of the defendant have injured the plaintiff. If the complaint contains allegations of actions which have not had that effect, it is unnecessary to consider them, however much they may contravene the other provisions of the statute. Thus the averments concerning the various combinations for the elimination of competition, standing by themselves, are immaterial. If the defendant had not done the things which injured the plaintiff, no cause of action would be stated even if it were apparent that the pre-existing combinations had been of the most unlawful nature. So the allegations concerning the purchase of the alleged title and the communication of the Colombian official to his government are immaterial because it does not appear that they injured the plaintiff.

The only damages claimed in the complaint are—stated inversely to the order of their importance—:

(1) For the injury resulting from the securing of control by the defendant and its associates of the banana market.

(2) For the injury to the plantation, business and railroad inflicted by the Costa Rican officials.

Now in order to state a cause of action for damages under the statute it is not necessary to aver an injury to an existing business. As said by this court in *Thomsen v. Union Castle Mail Steamship Co.* decided October, 1908: "It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business." (See also *Pennsylvania Sugar Refining Co. v. American Sugar Re*

fining Co., decided this day.) But it *is* necessary to state facts showing an intention and preparedness to engage in business. Thus in the *Pennsylvania Sugar Refining Case* it was alleged that the plaintiff had erected and equipped a sugar refinery and was prepared and intended to engage in the manufacture and sale of sugar, when it was prevented from so doing by the acts of the defendants. In the present case, however, it is not alleged that the plaintiff had made any preparations to engage in the business of buying bananas independently of the operation of its own plantation, nor that it desired or intended to engage therein as a separate and independent business. It is not averred that the plaintiff invested any money in preparing to engage in any such independent business; nor does the extent to which, nor even the country in which, it desired or intended to engage therein, appear. The only allegation is that the defendant's control of the banana market in the West Indies and Central and South America prevented the plaintiff "from buying any bananas and shipping them and selling them in the United States as it would otherwise have done to its great profit." But in view of the other allegations of the complaint and of the fact that this demand is stated as the basis for claiming "additional" damage we think that it should be treated as being incidental to the more substantial demand for damages for injuries to the plantation and railroad—that the plaintiff intended to deal in bananas from other plantations only as auxiliary to its principal business of growing and shipping its own fruit. Certainly the allegations are too indefinite and uncertain to state a cause of action based upon an independent and separate demand. Therefore, unless our inquiry shows that the complaint states a cause of action growing out of the acts of the Costa Rican officials, we must hold that it was properly dismissed.

In pursuing this inquiry we may consider, in addition to the facts stated in the complaint, those appearing in the letter of Secretary Root to the American minister at Panama. In this letter the Secretary says, among other things:

"In the Department's conception of this matter, Costa Rica exercises at present a temporary *de facto* sovereignty over the territory included in the McConnell concession, subject of right to be diverted at any time at the will of Panama, but actually continuing until such time as the pending boundary treaty is ratified.

* * * * * * *

"In considering the present connection of Panama with the territory in question, it would appear that that State has consented that Costa Rica continue as the *de facto* sovereign until the ratification of the treaty. If Panama should interfere and seek to exercise at present jurisdiction north of the Sixola River, this would be inconsistent with her recognition of Costa Rica's temporary sovereignty in that district. In the view of the Department as long as the latter government is the sovereign in possession, whatever attributes that accompany or attend possession should be conceded to her, including the right to control by taxation or otherwise, importations, etc., at Gadocan."

Whatever, therefore, may have been the Loubet award or its effect with respect to the boundary line between Costa Rica and Colombia—whatever may have been the rights *de jure*—we must start with the proposition that the plaintiff's plantation at the time of the acts in question was in territory over which Costa Rica was *de facto* sovereign. We must also treat the acts of the soldiers and officials of Costa Rica as acts done by the authority of the government of that country. The complaint shows that that government in effect ratified such acts and refused to withdraw from the plaintiff's plantation.

Now the only theory upon which the plaintiff can be awarded damages against the defendant is that it is responsible for *unlawful* acts instigated by it. It cannot be held responsible for procuring that to be done by authority of the government of Costa Rica which was lawful. Consequently this court is called upon to investigate the lawfulness of acts done under the authority of a foreign independent State.

But this court cannot undertake any such investigation. The acts complained of were adopted by the government of a sovereign State in its political capacity and in the exercise of its *de facto* sovereignty. The question of their legality or illegality cannot be determined by the courts of another country.

In *Underhill v. Hernandez*, (65 *Fed.* 577, 579), this court said:

"Conditions of comity and of the highest expediency require that the conduct of States, whether in transactions with other States or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunal of any other jurisdiction. The citizens of a State have an adequate redress for any grievance at its hands by an appeal to the courts or the other departments of their own government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs even by a resort, if necessary, to the arbitrament of war. It would be not only offensive and unnecessary but it would imperil the amicable relations between governments and vex the peace of nations to permit the sovereign acts or political transactions of States to be subjected to the examination of the legal tribunals of other States."

And in affirming the judgment in the *Hernandez* case the Supreme Court of the United States said (168 *U. S.* 251):

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

In Webb's Pollock on Torts, p. 137 it is said:

"An act done by the authority, previous or subsequent, of the government of a sovereign State in the exercise of *de facto* sovereignty, is not examinable at all in the courts of justice of any other State."

See also *Duke of Brunswick v. King of Hanover* (2 *H. L. Cas.* 1)

(affirming 6 *Beav.* 1, 13 *L. J. Ch.* 107); *Nabob of Arcot v. East India Co.* (4 *Brown Ch.* 131); *Hatch v. Baez* (7 *Hun.* 596).

As already indicated, it is sufficient to exclude an examination by this court of the lawfulness of the acts in question that they were committed in territory over which Costa Rica was the *de facto* sovereign. Indeed had that government been merely a *de facto* government, its acts could not be called in question. (See the *Hernandez* case *supra*, 65 *Fed.* 577, 582). And the letter of the Secretary of State here shows that Panama even consented that Costa Rica should exercise temporary sovereignty over this territory until the ratification of a treaty between them.

Upon principle and authority, it follows that Costa Rica is entitled to immunity from any investigation of its sovereign acts by this court. The plaintiff, however, asserts that this immunity is only an immunity from suit which has no bearing upon the defendant's liability. But, as we have seen, the immunity is far broader than this. The validity of an act adopted by a sovereign State cannot be inquired into at all—directly or collaterally—by the courts of another State. Relief must be sought in the courts of the former State or through diplomatic channels.

It is further urged that the Costa Rican government should be treated as the agent of the defendant and that the defendant should be held responsible as principal for its acts. But the relation of a government acting in its political capacity to a person who furnishes the information upon which it acts, cannot from the very nature of things be that of principal and agent. The early case of *Rafael v. Verelst*, (2 *Wm. Black*, 1055) cited by the plaintiff does not sustain any such proposition. The very point of that case was that the Nabob who seized the plaintiff was not acting as sovereign, but contrary to his own inclination—as "a mere machine, an instrument and engine of the defendant." In the present case, although instigated by the defendant, there is nothing to show that the Costa Rican government failed to act upon its own responsibility as a sovereign State or that it ever professed to act in behalf of the defendant.

Upon similar principles there is no ground for contending that the defendant and the government of Costa Rica were joint tort feasors. That relation, too, is wholly inconsistent with the relation of a sovereign government acting in its political capacity—as the government of Costa Rica did—to an informer, no matter how malicious the latter might be.

For these reasons it is held that the acts which resulted in the injury to the plaintiff's business and property were those of the government of Costa Rica for which the defendant cannot here be held responsible. Consequently the complaint—based upon those acts—fails to state a cause of action.

The judgment of the Circuit Court is affirmed.

Everett P. Wheeler, for the Plaintiff in Error.

Morfield Story and Henry W. Taft, for the Defendant in Error.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 26th day of December one thousand nine hundred and eight.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Walter C. Noyes, Circuit Judges.

AMERICAN BANANA COMPANY, Plaintiff in Error,
vs.
UNITED FRUIT COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

E. H. L.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

Endorsed: United States Circuit Court of Appeals, Second Circuit. American Banana Co. *vs.* United Fruit Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 26, 1908. William Parkin, Clerk.

The Supreme Court of the United States.

AMERICAN BANANA COMPANY, Plaintiff in Error,
against
UNITED FRUIT COMPANY, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the 13th day of January, in the year of our Lord one thousand nine hundred and nine, at the October Term for the year one thousand nine hundred and eight, of the Supreme Court of the United States, at the Capitol, in the City of Washington and District of Columbia, comes the said American Banana Company by Everett P. Wheeler, its counsel, and says that in the record and proceedings in the above entitled matter, there is manifest error in this, to wit:

First. The United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States Circuit

Court for the Southern District of New York, dismissing the complaint herein and directing judgment for the defendant.

Second. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in granting the motion made by the defendant to dismiss the complaint herein on the ground that it did not state facts sufficient to constitute a cause of action, and in directing judgment for the defendant on said ground.

Third. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in holding that it ought to decline rendering judgment in this suit upon the issues because said judgment would involve passing judgment upon an act of the Republic of Costa Rica.

Fourth. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in holding that a trial herein and judgment for the plaintiff herein would involve passing judgment on an act of the Republic of Costa Rica.

Fifth. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in holding that it had no power to sit in judgment in an action between two citizens of the United States upon the validity or legality of the act of any sovereign independent nation.

Sixth. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in declining to hold that the effect of the Treaty between the United States of America and the Republic of Panama, mentioned in the complaint, and of the Constitution of said Republic, and of the award of the President of the French Republic, also therein mentioned, was to constitute the Republic of Panama the sovereign of the territory on the northerly bank of the Sixola River, which was occupied by plaintiff, and that, therefore, the acts in said territory of the officials of Costa Rica were without authority.

Seventh. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in holding that the Act of Congress, approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," had no application to the acts charged in the complaint against the defendant herein.

Eighth. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in holding that under said Act the plaintiff had no cause of action against the defendant for the ejection from its plantation and the seizure and destruction of its real and personal property, alleged in the complaint, said acts having been procured and instigated by the defendant for the purpose of preventing the plaintiff from harvesting bananas upon its plantation and transporting them to the United States, and there selling them in competition with defendant.

Ninth. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in holding that plaintiff could not recover in this action damages for the injury it suffered by reason of acts of the defendant done in Central America which

closed the banana market there to it, in pursuance of the combination and conspiracy alleged in the complaint.

Tenth. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in holding that unless the acts of the Costa Rican officials, alleged in the complaint, were adjudged in themselves illegal, the defendant's malice, intention or profit were not material.

Eleventh. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in limiting by construction the general language of said Act, and particularly of the seventh section thereof, and in not giving effect to the plain and obvious terms of said section.

Twelfth. Said Circuit Court of Appeals erred in holding that the Government of Costa Rica could not be, and was not, the agent of defendant.

Thirteenth. Said Circuit Court of Appeals erred in holding that the Government of Costa Rica and defendant could not be joint tort feasors.

Fourteenth. The said Circuit Court of Appeals erred in so far as it affirmed the action of said Circuit Court in not denying the said motion made by said defendant and ordering the trial to proceed.

Whereas, by the law of the land, the said judgment of the United States Circuit Court ought to have been reversed and judgment rendered for the plaintiff in error with a writ of inquiry as to the damages sustained by the plaintiff, by reason of the wrongful acts alleged in the complaint.

Wherefore the said American Banana Company prays that the judgment aforesaid may be reversed and set aside, and that such further proceedings may be had herein as are authorized by law and by the practice of the courts of the United States.

EVERETT P. WHEELER,
Counsel for Plaintiff in Error,
21 *State Street, New York City.*

Endorsed: United States Supreme Court. American Banana Company, Plaintiff in Error, against United Fruit Company, Defendant in Error. Assignment of Errors. Wheeler, Cortis & Haight, Att'ys for Plaintiff in Error, 21 State Street, New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1909. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

AMERICAN BANANA COMPANY, Plaintiff,
against
UNITED FRUIT COMPANY, Defendant.

Bond for Damages and Costs.

Know all men by these presents:

That we, the American Banana Company, a corporation incorporated under the laws of the State of Alabama, and having an office for the transaction of business in the City of Mobile, State of Alabama, as principal, and The United States Fidelity & Guaranty Company, having an office and usual place of business at No. 66 Liberty Street, in the City of New York, County of New York and State of New York, as surety, are held and firmly bound unto the above named United Fruit Company, in the sum of Three hundred and Twenty-five Dollars ($325.00), lawful money of the United States, to be paid to the said United Fruit Company, for the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal, and dated this 9th day of January, in the year of our Lord one thousand nine hundred and nine.

Whereas, the above named American Banana Company is about to take out a writ of error to the United States Supreme Court to reverse the judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming the judgment of the United States Circuit Court for the Southern District of New York, rendered March 27th, 1908, in the above entitled suit, and the mandate of the said United States Circuit Court of Appeals, dated the 28th day of December, 1908, having been filed in the said United States Circuit Court, and pursuant and in obedience to said mandate, an order having been entered in the office of the Clerk of the said United States Circuit Court on the 4th day of January, 1909, making the judgment of the said United States Circuit Court of Appeals the judgment of the said United States Circuit Court, and directing that the said defendant, United Fruit Company, recover from the plaintiff, American Banana Company, the sum of Thirty-one and 70/100 Dollars ($31.70), its costs in the said United States Circuit Court of Appeals as taxed; and

Whereas, the said order on the mandate duly entered on the 4th day of January, 1909, allows a stay of execution thereunder for twenty days to enable the plaintiff to sue out a writ of error to the Supreme Court of the United States, provided it give a supersedeas bond in double the amount of the judgment within ten days after service of notice of entry of the judgment, to be approved by the Clerk, and conditioned to pay the judgment in case the Supreme

Court of the United States affirms the judgment of the United States Circuit Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such, that if the above named American Banana Company shall prosecute its writ of error to effect, and answer all damages and costs, including the costs already taxed against it in this Court if it fails to make its plea good, then this obligation to be void, otherwise, to remain in full force and virtue.

[SEAL.] AMERICAN BANANA COMPANY,
By H. B. MENDENHALL,
Secretary & Treasurer.

Sealed and delivered, taken and acknowledged, this 13th day of January, 1909.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest: GEORGE E. HAYES, *Attorney-in-Fact.*

STATE OF ALABAMA,
County of Mobile, ss:

On this 9th day of January, 1909, before me personally appeared H. B. Mendenhall to me personally known and known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same on behalf of the American Banana Company.

[SEAL.] S. B. MEYER,
Notary Public, Mobile Co., State of Alabama.

Affidavit, Acknowledgment and Justification by The United States Fidelity and Guaranty Company.

We Will Bond You.
Contract, Fidelity, Judicial, Burglary.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of American Banana Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity and Guaranty Company. and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August

13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of American Banana Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 13 day of Jan. 1909.

DANIEL C. DEASY,
Notary Public, New York County.

Endorsed: United States Circuit Court of Appeals for the Second Circuit. American Banana Company, Plaintiff, against United Fruit Company, Defendant. Bond. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 14, 1909. William Parkin, Clerk. Approved. H. G. W., U. S. C. J. January 13, '09.

Form and sufficiency of within bond approved.
N. Y., Jan'y 13, 1909.

STRONG & CADWALADER,
Att'ys for Def't.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 125 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of American Banana Company against United Fruit Company, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of January, in the year of our Lord One Thousand Nine Hundred and Nine and of the Independence of the said United States the One Hundred and thirty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

To United Fruit Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein American Banana Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of January, in the year of our Lord one thousand nine hundred and nine.

H. G. WOOD,
Circuit Judge.

[Endorsed:] United States Supreme Court. American Banana Company, Plaintiff in Error, against United Fruit Company, Defendant in Error. Citation. Wheeler, Cortis & Haight, Att'ys for Plaintiff in Error, 21 State Street, New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 15, 1909. William Parkin, Clerk. A copy of the within paper received this day Jan. 14, 1909. Strong & Cadwalader, Att'ys for ——.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between American Banana Company, plaintiff, and United Fruit Company, defendant, wherein is involved the construction and application of the Constitution of the United States, and of the laws of the United States relating to the Jurisdiction of the Circuit Courts of the United States, and also of the law of the United States, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," a manifest error hath happened, to the great damage of the said plaintiff American Banana Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date

hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of January, in the year of our Lord one thousand nine hundred and nine.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the Circuit Court of Appeals for the United States of America for the Second Circuit.

The foregoing writ is hereby allowed.
January 13th 1909.

H. G. WOOD,
Circuit Judge.

[Endorsed:] United States Supreme Court. American Banana Company, Plaintiff in Error, against United Fruit Company, Defendant in Error. Writ of Error. Wheeler, Cortis & Haight, Att'ys for Plaintiff in Error, 21 State Street, New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 15, 1909. William Parkin, Clerk. A copy of the within paper received this day Jan. 14, 1909. Strong & Cadwalader, Att'ys for ——.

Endorsed on cover: File No. 21,482. U. S. circuit court appeals, 2d circuit. Term No. 686. American Banana Company, plaintiff in error, *vs.* United Fruit Company. Filed January 19th, 1909. File No. 21,482.

APR 5 1909
JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1908, No. 686.

AMERICAN BANANA COMPANY,
Plaintiff and Plaintiff in Error,

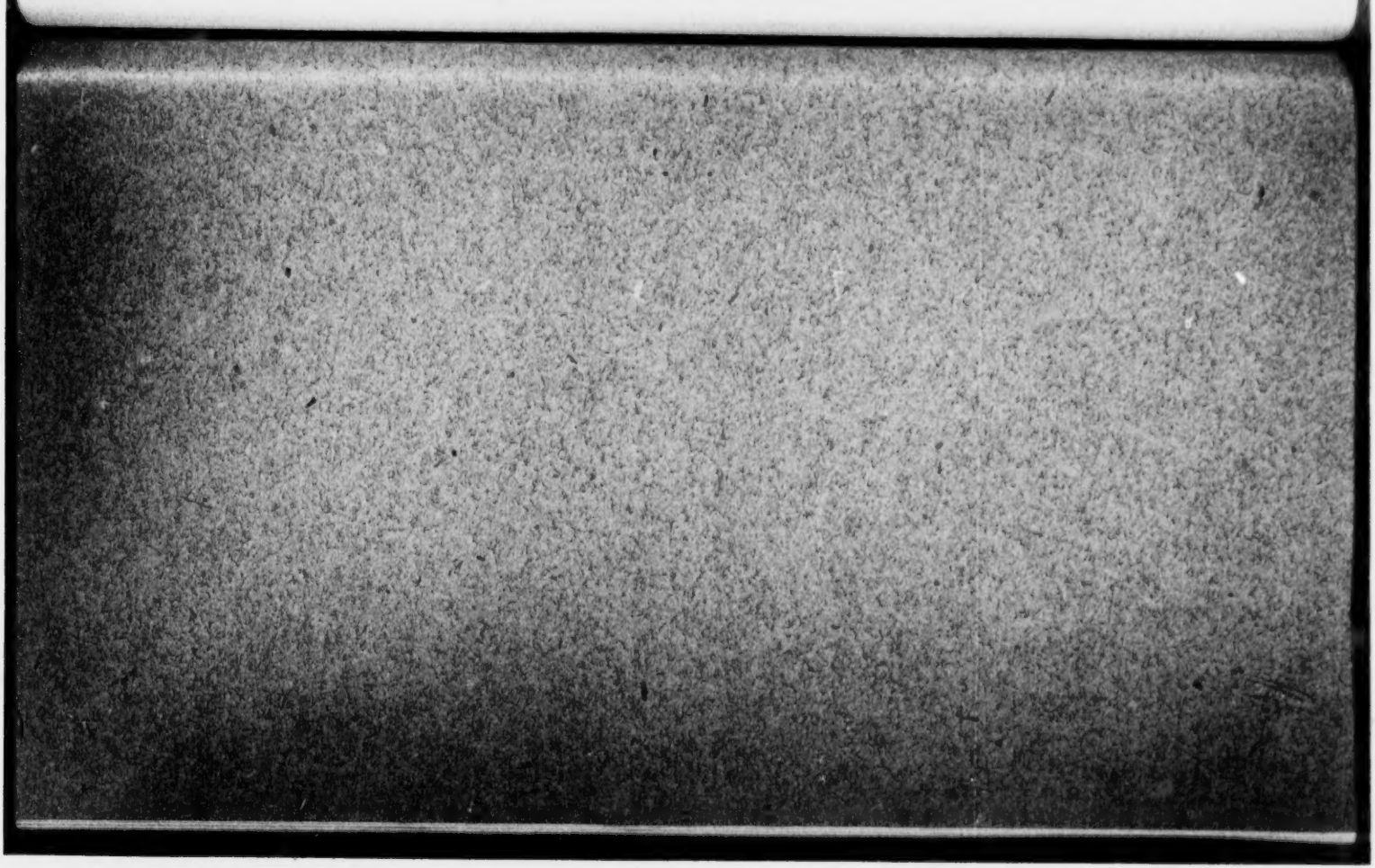
against

UNITED FRUIT COMPANY,
Defendant and Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EVERETT P. WHEELER,
HORACE E. DEMING,
Of Counsel for Plaintiff in Error.

R. H. TYRRELL, PRINTER, 200-2 FULTON STREET, NEW YORK.



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Supreme Court of the United States.

AMERICAN BANANA COMPANY, Plaintiff in Error, *against* UNITED FRUIT COMPANY, Defendant in Error.	October Term, 1908. 686.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case comes up on writ of error to review a judgment of the Circuit Court of Appeals for the Second Circuit, affirming a judgment of the Circuit Court in favor of defendant. Plaintiff is a citizen of Alabama, defendant a citizen of New Jersey. The action was brought under the Act of July second, 1890, commonly called the Sherman Law. The complaint alleged the formation by defendant and other persons and corporations within the United States, of a combination and conspiracy in restraint of the foreign and interstate commerce of the United States in bananas, in order to obtain for defendant a monopoly of such commerce. Plaintiff, a competitor of defendant, had acquired a banana plantation on the northerly

bank of the Sixola River in the Republic of Panama. The territory in which all of plaintiff's banana lands are situated had previously been awarded to Colombia by the President of the French Republic by an award duly made in pursuance of treaty between Colombia and Costa Rica. It passed to Panama when that State became independent in 1903. As a part of said conspiracy defendant in 1904 seized, and in part destroyed this plantation and plaintiff's railway connecting it with the coast. This was done through the instrumentality of certain officials of the Republic of Costa Rica, whom defendant instigated and induced to do these injuries to plaintiff. Other acts of injury to plaintiff's business and property are alleged in the complaint, which asks judgment for treble damages under the statute.

When the jury was empaneled and sworn, defendant moved on the pleadings for judgment on the ground that the complaint did not state a cause of action (Record, pp. 71, 81, 82). The trial judge granted the motion after allowing amendments to the complaint, which are incorporated in the complaint as printed in the record. Judgment was thereupon entered for defendant (p. 71).

The bill of exceptions is at pp. 81-84.

The decision below is reported 166 Fed., 261.

The Circuit Court held that the Sherman Act gives no right of action to one who is not deprived of profits, trade or commerce already existing, and that it does not apply to the wrong committed by an American citizen who destroys the business of another citizen "before the profits thereof are realized, and prevents him from carrying on said business and trade to a profitable termination."

This was overruled by the Circuit Court of Appeals, which held (p. 106), that "it is as unlawful to prevent a person from engaging in business as it is to drive him out of business." It affirmed the judgment on the ground that to give judgment in favor of the plaintiff the court would have to inquire into and pass upon the lawfulness of the act of a foreign government and that the court, therefore, had no jurisdiction (pp. 108, 109).

Defendant admits that it entered into a combination forbidden by the laws of the United States to commit acts, also so forbidden, damaging to the property and business of the plaintiff, a citizen of the United States; that the unlawful purpose was accomplished and the damage inflicted; that defendant and every other member of the unlawful combination is a citizen of the United States; in brief, that a citizen of the United States is seeking judgment against another citizen for damages inflicted contrary to a law of the United States in a United States Court which has jurisdiction both of the parties and of the subject matter. "But," says defendant,

> "I was shrewd enough to use as my tool in breaking the laws of the United States certain persons wearing the livery of a foreign government and by clever representations I induced that government to assume responsibility; and, therefore, I am immune."

Partly, through misapprehension of the facts, and partly through misapprehension of the law, the Court below has sustained this open and defiant breach by an American citizen of the laws of the United States. For that reason we have

brought the record before this court. The decision, if favorable to the defendant, will establish an absolutely new precedent.

Assignment of Errors.

This is to be found *in extenso* at pages 110 to 112. It may thus be summarized:

The Court erred:

1. In affirming the judgment dismissing the complaint.

2. In holding that the court should not hear the case because it "would involve passing judgment upon an act of the Republic of Costa Rica."

3. In holding that judgment for the plaintiff would involve passing judgment on an act of such Republic.

4. In holding "that it had no power to sit in judgment in an action between two citizens of the United States upon the validity or legality of the act of any sovereign independent nation."

5. In refusing to hold that the effect of the treaty between United States and Panama, of the Constitution of Panama and of the award of the President of the French Republic, constituted the Republic of Panama sovereign of the territory on the north bank of the Sixola River, which was occupied by the plaintiff, and that therefore the officials of Costa Rica were without authority therein.

6. In holding that the Sherman Act had no application to the plaintiff's business, or to the acts charged against the defendant.

7. In limiting by construction the general language of said act, and particularly of the seventh section thereof, and in not giving effect to the plain and obvious terms of said section.

8. In holding that defendant was immune because neither the persons wearing the Costa Rican livery nor the Costa Rican government could be or were either the tools or agents of the combination, or joint tort-feasors with the defendant.

The assignments of error in the Circuit Court are at pp. 92-95. They cover the same points as those already stated, and in addition the following, on which the Circuit Court of Appeals ruled in favor of plaintiff:

9. In holding that said act gives no right of action to one who is not deprived of profits, trade or commerce already existing.

10. In holding that it does not apply to the wrong committed by an American citizen who destroys the business of another citizen "before the profits thereof are realized, and prevents him from carrying on said business and trade to a profitable termination."

FIRST.

Jurisdiction of the Court.

Section 2, Article 3, of the Constitution of the United States provides:—

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority."

Section 1 of the same Article provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

The Judiciary Act of 1789 ordained and established Circuit Courts of the United States. The Act of March 3, 1875, C. 137, Sec. 1 (18 Stat. 470) (1 Comp. Stat. 508) provides:

"The Circuit Courts of the United States shall have original cognizance * * of all suits of a civil nature * * arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority."

Section 7 of the Sherman Act expressly provides that "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found."

Finally Section 2, Article 6, of the Constitution provides:—

"This Constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

As Webster said in his final reply to Hayne (Webster's Works [first edition], Vol. 3, p. 343):

"This needs no construction. Here is a law, then, which is declared to be supreme; and here is a power established, which is to interpret that law."

Where are the authorities to limit these express provisions? There are none.

Underhill *v.* Hernandez is that most relied upon. This, by express limitation in the opinion of the Court, is applicable only to the acts of duly constituted military authorities in time of war (*infra*, p. 12).

The suit at bar is a suit of a civil nature, arising under the laws of the United States and a treaty made under their authority. It is brought to recover for injuries done by defendant declared to be unlawful by the Sherman Act. The defendant has been duly served with process, has appeared and has answered on the merits. Yet the learned Court, overlooking the express provisions just cited of the Constitution and laws, which it was bound to administer and enforce, ruled that it had no jurisdiction to enforce a right given by a statute of the United States. This is put on the ground of certain doctrines of the common law, which it is claimed disable the Court from enforcing the express provisions of the United States Statute. These citations are irrelevant. Whatever the common law may have been, it is controlled by the law of the United States. This is made by the Constitution *the supreme law.*

The Court declares (p. 109) that "the validity of an act adopted by a sovereign state cannot be

inquired into at all—directly or collaterally—by the courts of another state."

This ignores the fundamental fact that this is a Court of the United States and is bound to administer the jurisdiction conferred upon it by the laws of its creation. What right had the Court to decline to exercise its jurisdiction?

SECOND.

No considerations of public policy or of comity forbid the Courts of the United States to exercise jurisdiction and decide this controversy on the merits.

The court below refused to exercise jurisdiction upon the view that this case could not be decided without holding that the Republic of Costa Rica had been guilty of an unlawful act, and that considerations of comity prevent the court from exercising its jurisdiction. This was error for the following reasons:

1. The wrong here was done in violation of an express statute of the United States. Costa Rica cannot give to defendant immunity for this offense.

2. It was done in time of peace, and by one American citizen against another (*infra*, p. 12).

3. The real controversy is between American citizens. Inquiry as to the acts of foreign of-

ficials is involved only collaterally. Neither the foreign power nor its officers are sued (*infra*, p. 17).

4. The acts of the foreign officials were procured by defendant (*infra*, p. 20).

5. The acts of those officials were without the territory of their government, and therefore unlawful, and not the acts of the Government (p. 23).

6. A wrong done in time of peace to a citizen of the State where the suit is brought and upon whose laws the action is based is always justiciable in its courts (p. 24).

7. Private torts to person and property are not acts of State (p. 27).

The foregoing propositions will be discussed in turn.

1. What are the acts complained of? The breaking up of plaintiff's business and destruction of its property by a defendant confessedly engaged in a conspiracy to monopolize the entire foreign trade of the United States in bananas. The Sherman Act in express terms gives a remedy. The Court below denied it, and limited the statute by adding the following words: "Unless a foreign government shall have assisted an American citizen to do the thing declared by this act to be unlawful." This it had no right to do.

The courts are not at liberty to limit the express words of a statute by engrafting upon it exceptions.

United States *v.* Union Pacific, 91 U. S., 72, 91.

Section 2 of the Sherman Law provides that *every person* who shall monopolize or combine

or conspire with any other person or persons to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. Section 7 provides that any person injured in his property or business, by reason of such acts, may sue therefor.

Section 8 provides:

"The word person, wherever used in the act, shall be deemed to include corporations and associations, existing under, or authorized by the laws of any foreign country."

This defendant is a person, and has done such acts. The court has no right to say that because it considers the policy of such a statute bad as applied to cases involving the acts of foreign governments, it will, therefore, *pro tanto* repeal the statute.

The well settled rule for the construction of statutes is stated by this Court in

French *v.* Spencer, 21 How., 238.

"Where the Legislature makes a plain provision, without making any exception, the Courts can make none."

Chancellor Kent in Demarest *v.* Wynkoop, 3 Johns. Ch., 129 at 142, thus states the rule:

"General words in the statute must receive a general construction, and if there be no express exception, the court can create none."

S. P. Chamberlain *v.* The Western Transportation Co., 44 N. Y., 305, 309.

Bank of Republic *v.* City of St. Joseph, 21 Blatchf., 436, 439.

Whatever value the principles of comity may have, they cannot be extended so far as to cloak a violation of the laws of the nation whose comity is appealed to.

"It would, indeed, be strange if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself."

The Santissima Trinidad, 7 Wheat., 283, 354.

In *The Bello Corrunes,* 6 Wheat., 152, at 169, the court says:

"But can a citizen of this country, who has violated its laws, ever be recognized in our courts as a legal claimant of the fruits of his own wrong? We are of opinion he cannot."

This rule has often been applied in cases where the affairs of foreign governments were so involved that for reasons of policy the courts might well have desired to create exceptions. In *The Marianna Flora,* 11 Wheat., 1, the act of March 3, 1819, came under consideration. Section 2 of that act authorized the President to empower the United States vessels to subdue "any armed vessel or boat * * * which shall have attempted or committed any piratical aggression * * * upon any vessel of the United States." A Portuguese vessel was seized by a United States cruiser, and sent into port for adjudication under the provision of this statute. She was libelled and condemned. Judge Story, in delivering the opinion of the Supreme Court, said (pp. 39, 40):

"It has, indeed, been argued at the bar that, even if this attack had been a piratical aggression, it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of congress is decisive on this subject. It not only authorized a capture, but a condemnation in our courts, for such aggressions; and whatever may be the responsibility incurred by the nation to foreign powers in executing such laws, there can be no doubt that courts of justice are bound to obey and administer them."

See too the words of Lord Esher quoted, *infra*, p. 78.

In *The Merino*, 9 Wheat., 391, 405, the Supreme Court sustained the validity of the seizure of a vessel engaged in transporting slaves from Havana to Pensacola, both places belonging to the King of Spain. In both the slave trade was lawful. But the act was a violation of the Act of Congress of May 10, 1800 (2 Stat., 70), which prohibited any citizen of the United States from having any right of property in a vessel engaged in "carrying slaves from one foreign country or place to another." It further prohibited the taking on board of slaves by a citizen of the United States in a foreign place, for the purpose of there being held to service or labor. The Court sustained the capture, and said (p. 405):

"The court do not feel themselves justified in restraining the general expression of this law, upon the ground of a supposed policy, the reality of which, to say the most of it, is very questionable."

In *La Jeune Eugenie*, 2 Mason, 409, Mr. Justice Story said (p. 431):

"The case has already, as we are informed, and truly, become the subject of diplomatic intercourse between our government and that of France; * * * however delicate or painful may be its predicament (the court) cannot seek shelter under the wings of executive authority, or bind up its judgment under considerations of mere convenience or comity, or a blind obedience to the wishes of any sovereign, or a desire to extinguish what it must justly deem a trade abhorrent to the great principles of Christian morality, mercy and humanity. It is bound to administer the law, as it finds it, fearlessly and faithfully, according to the dictates of its own judgment, in the hope at least, that errors of law may be corrected by a higher tribunal, and national difficulties may be removed by those, who hold the legislative and executive authorities of the nation."

2. The decision of the Court below was rested upon Underhill *v.* Hernandez, 65 Fed. Rep., 577; affirmed 168 U. S., 250. Neither that case nor the authorities cited in it are in point.

A. In Underhill *v.* Hernandez, action was brought against a defendant who was an officer of a revolutionary army engaged in actual warfare in Venezuela. He was a citizen of Venezuela. The revolution was successful, and the government established by the party to which the defendant belonged, was recognized by the United States as the lawful government of Venezuela. Defendant compelled plaintiff to run water works necessary for supplying water to a city held by the troops commanded by defendant. The court held that the acts were *bona fide* acts of warfare and were necessary to the successful conduct of the war.

In the case at bar, the officer is not a defendant; there was no state of war; the acts were done, not within the territory of the sovereign (a fact upon which the Circuit Court of Appeals in the Underhill case laid particular stress), but outside the territory of the sovereign. Most important of all, the Underhill suit was not under a statute which made it mandatory upon the court to exercise jurisdiction. Moreover, the present action is not an action of trespass or of ejectment, —in other words, is not based primarily on the act of Costa Rican officers, but is an action for damage done plaintiff by defendant's restraint of international commerce.

At the end of the opinion, this Court expressly said (p. 254):

"Cases respecting arrests by military authority in the absence of the prevalence of war; or the validity of contracts entered into by individuals in aid of insurrection; or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy; and the like, do not involve the questions presented here."

"We agree with the Circuit Court of Appeals that 'the evidence * * * was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or by any personal or private motive.'"

In the case at bar it is admitted that defendant was so actuated.

Any general expressions in the opinion must be interpreted by the facts, and not extended to cases to which the Court said it did not apply.

B. The distinction between Underhill *v.* Hernandez and the case at bar is illustrated by People *v.* McLeod, 25 Wend., 483. McLeod was accused of murder, committed in the territory of the state of New York, while he was claiming to act under the orders of the authorities of the Dominion of Canada. His release was sought on habeas corpus, on the ground that, while acting under the orders of the Canadian authorities, he was not subject to the criminal jurisdiction of New York. His release was refused, Mr. Justice Cowen writing an elaborate opinion, in which the whole question was carefully discussed. The following quotations from it are in point:

Page 590:

"'The laws of no nation,' says Mr. Justice Story, 'can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws': The Appollon, 9 Wheat., 362, 371, 372. He has examined the question at large in his book on the Conflict of Laws, c. 2, secs. 17-22, p. 19 of 2d ed. The result is, that no nation is bound to respect the laws or executive acts of any foreign government intended to control or protect its citizens while temporarily or permanently out of their own country, until it first declare war. Its citizens are then subject to the laws of war. Till that comes, they are absolutely bound by the laws of peace. While this prevails, a foreign executive declaration saying, 'My subject has offended against your criminal laws. I avow his act. Punish me, but impute nothing to him',—is a nullity. As well might a nation send a company of soldiers to con-

tract debts here, and forbid them to be sued, saying: 'The debt was on my account; discharge my men, and charge it over against me.' "

Page 594:

"Independently of this exception, therefore, Rutherforth insists, with entire accuracy, that 'as far as we concur in what another man does, so far the act is our own; and the effects of it are chargeable upon us as well as upon him.' Ruth., b. 1, c. 17, sec. 6. A nation is but a moral entity; and, in the nature of things, can no more wipe out the offense of another by adopting it, than could a natural person."

Mr. Justice Cowen points out that acts done in peace involve very different questions from acts of war.

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"This brings us to the great question in the cause. We have seen that a capital offense was committed within our territory in time of peace; and the remaining inquiry is, whether England has placed the offenders above the law, and beyond our jurisdiction, by adopting and approving such a crime."

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"In the second place, I deny that she can, in time of peace, send her men into our territory, and render them impervious to our laws, by embodying them and putting arms in their hands. She may declare war; but if she claim the benefit of peace, as both nations have done in this instance, the moment any of her citizens enter our territory, they are as completely obnoxious to punishment by our law, as if they had been born and always resided in this country."

The case at bar is stronger in favor of plaintiff. Here the defendant is an American citizen acting in violation of American law.

The McLeod case has never been overruled, and has the sanction of this Court in Barrington *v.* Missouri, 205 U. S. 483, 487. Mr. Webster, under the peculiar circumstances, differed from Judge Cowen. But Mr. Forsyth, Mr. Webster's predecessor, took the same ground that the court did. He wrote in reply to the original demand made by the British Minister for McLeod's release (25 Wend. 483, at page 502N):

"If arrested at the time, the offenders (McLeod, &c.) might unquestionably have been brought to justice by the judicial authorities of the state within whose acknowledged territory these crimes were committed; and their subsequent voluntary entrance within that territory, places them in the same situation. The president is not aware of any principle of international law, or, indeed, of reason or justice, which entitles such offenders to impunity before the legal tribunals, when coming voluntarily within their independent and undoubted jurisdiction, because they acted in obedience to their superior authorities, or because their acts have become the subject of diplomatic discussion between the two governments."

3. The courts of this country can consider and collaterally pass upon the legality of acts of a foreign nation in a suit between its own citizens.

A. In many cases, courts have passed collaterally on the validity of the acts of foreign powers.

During the Wars of Napoleon, the Courts of England and of the United States had frequent occasion to investigate in suits on policies of in-

surance, the validity of seizures made by foreign men-of-war. The question in those cases, as in this, was whether in investigating a controversy between American citizens, either party could show the illegality of the action of a foreign government, officer or court. It was invariably held that the courts of England and of this country had such power.

Vasse *v.* Ball, 2 Dall., 270, 275.
3 Kent Comm., 303, 304.

In prize cases, if the prize comes into a neutral port, the neutral court may determine whether the prize was taken in violation of its neutrality. It may "take from the wrongdoer the property he had unjustly acquired, and reinstate the other party in his title and possession which have been tortiously divested."

The Santissima Trinidad, 7 Wheat., 283, 351, 354.

In this case Mr. Tazewell (of counsel) states the rule accurately (p. 308):

"The implied pledge given to a foreign state, of exemption from our local jurisdiction is violated the moment it infringes our laws, treaties and sovereign rights."

S. P. *The Estrella,* 4 Wheat., 298.

The basis of the principle that a sovereign is not suable is that it is incompatible with the dignity of a sovereign state to be called upon to submit to the judgment of a foreign tribunal. The reason for the rule entirely fails when neither the sovereign nor its representative is a party. No judgment is asked in the present case against

the Republic of Costa Rica, nor is it claimed that an adjudication here as to any matter at issue, would be binding on either Costa Rica or Panama.

The case at bar is precisely analogous to

Angle *v.* Chicago, St. Paul &c. R. Co., 151 U. S., 119.

There it was held that the act of a State Legislature could not be assailed on the ground that it was obtained by false representations, but that a defendant could be sued for obtaining it by such representations, with intent to injure the plaintiff. What distinction can fairly be taken between the two cases that is not favorable to plaintiff?

B. It is held that a court cannot sit in judgment on the act of a foreign power where that act is directly drawn in question in a suit directly against such foreign power, or against *an officer acting within its territory* under its commands. This is the extent of the rule. An examination of the cases cited in the Court below will make this clear.

In Nabob of Arcott *v.* East India Company, 4 Brown, Ch., 131 [180], suit was brought by one sovereign power against another for an account respecting moneys advanced in pursuance of treaty stipulations. It was properly held that the courts of England had no jurisdiction to enforce the provisions of a treaty between two foreign powers.

The Duke of Brunswick *v.* The King of Hanover, 6 Beav., 1 (affirmed 2 H. of L. 1), holds that "a foreign sovereign coming into this country cannot be made responsible here for an act done in his sovereign character in his own country."

This case seems to have originated the phrase that a court cannot sit in judgment on the act of a foreign sovereign. The case before the court, with reference to which these words were used, was, however, one where a direct judgment was asked in a suit against the sovereign. It is nowhere implied that if the interests of private litigants require a judicial determination of the validity of a foreign power's act the court must decline jurisdiction.

In Hatch *v.* Baez, 7 Hun, 596, the act drawn in question was done by the president of the Dominican Republic as such, and within the scope of his powers. He was defendant. The decision is restricted to acts done in the territory of the sovereign and by him.

In all the opinions of the Attorney General, cited in Underhill *v.* Hernandez, suit was either against a foreign sovereign or against some person acting under his direct commission.

In each case judgment was asked against the sovereign who did the act or made the contract, or his authorized representative.

4. A case precisely in point and decisive in favor of plaintiff, is Rafael *v.* Verelst, 2 Wm. Blackstone, 1055. The action there was trespass for false imprisonment, and was brought by an Armenian merchant, formerly resident in India against the President of the East India Company. It was found, by special verdict, that the plaintiff had been arrested at the order of the Nabob Sujah al Dowlah, who was an independent sovereign. It was further found that "such arrest and imprisonment were by the means and procurement of the defendant." The court held that the action was transitory, and that, though

the Nabob, as a sovereign, would not be liable to suit, still the defendant, who had used him as an instrument, was liable. The principal opinion was by DeGrey, C. J., Gould, Blackstone and Nares, JJ., concurring. Two sentences of the opinion precisely meet the contention of the defendant here.

"If, in the doing of an act, there be several intervening agents, and one happens not to be amenable, will it be said that all the rest are excused? Suppose it is the very act of the Nabob, who lends himself to the defendant's will, and undergoes a voluntary servitude to his pleasure,—the accidental circumstances of such a man shall not exempt the rest, who concur in the act. * * * Since, therefore, the jury have found the procurement of the defendant, it follows that he is liable as a principal, for this trespass."

This case disposes of the contention that the immunity from suit of one of the wrongdoers excuses the other, and also of the contention that the act of an independent sovereign cannot be collaterally passed upon by a foreign court.

The Court below distinguished this case on the ground that Mr. Justice Blackstone said that

"The Nabob is a mere machine—an instrument and engine of the defendant."

That was the learned Judge's interpretation of the special verdict. But that certainly was not averred in the declaration, which was in trespass.

The learned Court misapprehended the application of this statement. It was directed to the question whether trespass would lie for the injuries complained of, or whether the action should have been on the case.

All this is shown clearly by the report of the first hearing: 2 W. Bla., 983. The discussion on that hearing was as to whether trespass would lie for an act of the Nabob, procured and instigated by defendant. The finding on the second trial that the Nabob "acted contrary to his own inclination, being fearful of offending him" (defendant), removed any doubt as to the form of action. This is the point on which Mr. Justice Blackstone had doubted (p. 985). In this doubt DeGrey, C. J., and Gould, J., did not concur.

The old distinction between the form of action in trespass and that in case has not prevailed in New York since 1828 (Graham Practice, 86), and probably has been abolished in most of the States. It is forgotten, except as matter of antiquarian research. That is doubtless why the court below failed to appreciate Mr. Justice Blackstone's doubt.

The New York Code of Civil Procedure expressly provides (section 3339):

"There is only one form of civil action. The distinction between actions at law and suits in equity and the forms of those actions and suits have been abolished."

The learned Court also said "In the present case, although instigated by the defendant, there is nothing to show that the Costa Rican Government failed to act upon its own responsibility as a sovereign State" (page 109.) This overlooks the express allegations of Article 27, page 19, fol. 57, that "Costa Rican soldiers and officials were instigated and induced by said defendant to seize plaintiff's property," and on page 20, fol. 58, "defendant did induce said soldiers and officials to hold said property, occupy the plantation, stop the

construction and operation of the plantation railway and piers, and prevent the importation of supplies and the export of bananas." These acts were all prejudicial to the real interests of Costa Rica, which was to have its waste land cultivated and its products exported. It was not necessary or proper for the plaintiff to plead the graphic words of Mr. Justice Blackstone in regard to the acts of the Costa Rican Government. The allegation is that the acts were those of its officials, induced and instigated by defendant (page 24, fol. 72), and that "All the acts above set forth were done by the defendant under and in pursuance of the contracts, combinations and conspiracies aforesaid."

If there could be any doubt upon these allegations, which are properly allegations of facts, not evidence, it is removed by the express provision of the New York Code of Civil Procedure, Section 519.

"The allegations of a pleading must be liberally construed with a view to substantial justice between the parties."

Whether the evidence would justify a finding for plaintiff on this point would be for the jury—not for the Court to decide.

5. The supposed Government authority under which the act is done is in itself invalid. The Costa Rican officers, in destroying plaintiff's property and business, were acting outside the territory of Costa Rica, and were making an usurping inroad on the territory of an adjoining friendly power. Chancellor Kent says (1 Kent Comm. 120), "There is no exception to the rule

that every voluntary entrance into neutral territory with hostile purpose is absolutely unlawful."

Costa Rica could not authorize this according to any law, international or municipal. An order or commission purporting to give such authority would be *ultra vires* of the corporation known as the Republic of Costa Rica.

The facts and law bearing on these propositions are considered under the Eleventh Point, *infra*, p. 69.

In considering the defense that an act was done under authority of government, the courts have uniformly held that such authority must be valid or lawful. Suit against an officer for an unlawful act is not a suit against his sovereign.

> Poindexter *v.* Greenhow, 114 U. S. 270, at p. 290.

In United States *v.* Lee, 106 U. S., 196, the action was ejectment. The defense was that the defendants were in possession of the land, as officers of the United States, under the orders of the government and for its uses. The Supreme Court held that it was necessary to show that such possession under the United States was by virtue of some valid authority. In fact the contrary appeared to be the case, and the defense was therefore held bad, following the authority of Osborn *v.* The Bank of the United States, 9 Wheat. 738, where Chief Justice Marshall said (page 842):

"* * * but if the person who is the real principal, the person who is the true source of the mischief, by whose power, and for whose advantage it is done, he himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to

say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit."

It is not the State which does the unlawful acts, but its officers, and they may be sued.

Ex parte Young, 209 U. S. 123, 159.
Litchfield *v.* Bond, 186 N. Y. 66.

In People *v.* McLeod, 25 Wend. 483, the Court said (p. 590):

" 'In whatsoever he has no authority, there he is no king, and may be resisted; for wheresoever the authority ceases, the king ceases too, and becomes like other men who have no authority.' "

6. An injury to the private property of a citizen by an officer of government is justiciable in the Courts of the country of which he is a citizen, even if it be an "Act of State."

Baird *v.* Walker, L. R., [1892] App. Cas. 491.

There the plaintiff, a British subject, brought suit against an officer of the British Navy for damages for seizure of the plaintiff's fishing plant on the cost of Newfoundland, which seizure had been made by the defendant, under authority of the British government, for the enforcement of a *modus vivendi* with France in relation to the fisheries. The officer had acted within his authority and under the orders of the government. But the court considered the validity of these orders, held them invalid, and therefore no defense to the person acting under them.

Lord Herschell, delivering the unanimous judgment of the Court (composed of eight of the ablest judges in England) said (p. 497)

"The suggestion that they can be justified as Acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties, and other Acts of State, is wholly untenable."

So well established is the distinction we contend for that the Attorney General, Sir Richard Webster (p. 497) "conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers, of the rights of private individuals, whenever it was necessary in order to enforce the provisions of a treaty."

This case overrules, on this point, Buron *v.* Denman, 2 Ex. 167, cited by the District Judge (p. 77) if that case is susceptible of the construction put by him upon it. But really, Buron *v.* Denman is an authority for plaintiff. Plaintiff there was a subject of Spain. The Court enforced the British law against him. (See post p. 27.)

Feather *v.* The Queen, 6 Best & Smith, 257, 296, distinguishes Brown *v.* Denman on this very ground.

Lord Chief Justice Cockburn, delivering the judgment of the Court, says (pp. 296, 297):

"The decision leaves the question as to the right of action between subject and subject, wholly untouched. * * * A servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold

the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other."

In Little *v.* Barreme, 2 Cra., 170, 179, this Court said:

"The instructions (of the President) cannot change the character of the transaction, or legalize an act, which, without these instructions, would have been a plain trespass."

In Poindexter *v.* Greenhow, 114 U. S., 270, this court said:

"And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the state?"

The learned Court below cited Webb's Pollock on Torts, p. 137. But the Court appears to have overlooked the limitation quoted from Sir James Stephen (p. 132) "An act injurious to the person or property of some person *who is not at the time of that act a subject of her Majesty.*" Reference is made (p. 134), to the fact that the plaintiff in Buron *v.* Denman was a Spanish subject.

Pollock does not deal with the case of a combination between a British citizen and a foreign power to injure another British citizen. But every sentence, especially the reference to the case of general warrants (pp. 134, 135) shows that he maintained the old English principle, which our fathers brought to this country that "Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals."

Entick *v.* Harrington, 19 State Trials, 1043.
Money *v.* Leach, 3 Burr. 1742, 1762.

Indeed, rightly considered, Buron *v.* Denman is an authority for plaintiff. It maintained the supremacy of British law. The *lex loci* of plaintiff's barracoon protected his trade in slaves. The Court held that the British law could override this and protect a British citizen, the *lex loci* to the contrary notwithstanding. This is all plaintiff asks.

It is not praying for an injunction against Costa Rica. Had Gen. Lee sought an injunction against the United States in the Arlington case no doubt it would have been refused. Specific relief of that sort against acts of government may be denied. But where can defendant find an authority that the Court of one nation will not award damages for an act in violation of its own laws, done by one citizen against another, even though he has enlisted the aid of a foreign country?

7. We stand on the broad ground that it is never a defense, even to an officer who has committed a tort, that he has acted on behalf of his government, under circumstances like those in this case. *A fortiori* can it be no defense to the citizen of the country against whose laws the tort was committed that it was done through the agency of such officer.

There is no distinction between the power of the court to sit in judgment upon the act of a foreign government and that of its own government.

Buron *v.* Denman, 2 Exchequ. 167, deals with the act of a British naval officer, directed against a

Spanish subject, and ratified by the British government, and gives it protection as an act of state, in precisely the same way that the House of Lords dealt with the act of the King of Hanover in the Duke of Brunswick's case (2 H. of L., 1).

The phrase—act of state—does not aid us in the present controversy. The cases cited do not define it. Lord Campbell's phrase at p. 27 illustrates his conception of it:

"The Lord Chancellor, I presume, would not grant an injunction against the French Republic marching an army across the Rhine or the Alps."

If it could ever be a defense that a wrong done was "an act of state" the wrong sued for was not an "act of state." It was a mere private injury, maliciously procured by the defendant and therefore justiciable.

To use the language of Sir Montague E. Smith, J., in Musgrave *v.* Pulido, L. R. 5 App. Co. 102, 112, it must be "a political act of state" to constitute a defense.

1 Goodnow Comparative Administrative Law, 35, 36.

The annexation by the British East India Company of sundry petty principalities, in India, may have been "political acts of state." British Courts could not undertake to sit in judgment upon them in suits brought by native princes.

But the Court of Chancery sustained a bill against that company to obtain discovery respecting a tort done to its lessee in India.

Moodaly *v.* Moreton & East India Co., 2 Dickens, 652.

We have shown that it is the well settled doctrine of this Court that federal Courts are competent to sit in judgment upon the validity of the acts of officers of our own government in all cases of injury to private rights or private property. It is therefore clear that these Courts are, for a like reason, competent to sit in judgment upon the validity of the acts of officers of a foreign government when they are of the character existing in this case, as was actually done in Rafael *v.* Verelst and People *v.* McLeod, *supra,* pp. 20, 14, and in the insurance and prize cases, cited under the Second Point, subd. 2, A., *supra,* pp. 17, 18.

THIRD.

Damage sustained by the plaintiff was inflicted in pursuance of defendant's illegal combination, and is therefore actionable under the statute.

Defendant argued below that the damages alleged do not arise from any violation of the Sherman Act, but that such damage was merely caused by the action of one party to the combination.

The complaint alleges (Articles 35, 36, pp. 24, 25), that every one of the acts of aggression by defendant was done in furtherance of its illegal objects, and as part of its combination and scheme to control foreign commerce in bananas. Before plaintiff was incorporated the defendant threat-

ened McConnell, the plaintiff's assignor, that if he did not combine with plaintiff or give up trading in bananas it would block and obstruct his banana trade (p. 17, fol. 50). McConnell continued to be interested in the plaintiff and was for over a year its President (Complaint, Article 26, p. 19).

Here then we have threats, a conspiracy and overt acts in pursuance thereof, which have accomplished their intended purpose. All this would justify criminal prosecution. *A fortiori* it is enough to sustain a civil suit.

U. S. *v.* Patterson, 55 Fed., 605.

At p. 641, the Court, Putnam, J., said::

"Such being the case, acts of violence and intimidation may be alleged as means to accomplish the general purpose. Instead of lying outside of the statute, they may aggravate the offense. They are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind."

When the statute gives a right of action to any person who shall be injured "by reason of anything forbidden or declared to be unlawful by this act" it does not mean that such injury must be caused by the mere fact of conspiracy. What it means is, that if such a combination be formed, and its acts, done in furtherance of its illegal objects, cause injury, such injury is caused by reason of a combination "forbidden and declared to be unlawful" by the act.

Shawnee Compress Co., *v.* Anderson,
209 U. S., 423.

Defendant cannot complain because it alone is sued. Any member of such combination is liable for the acts of the combination, or any member of it, done in furtherance thereof.

City of Atlanta *v.* Chattanooga Foundry Co., 127 Fed., 23;
Chicago, &c., Coal Co. *v.* People, 214 Ill., 421 at 453.

Acts done in pursuance of a combination are none the less done in pursuance thereof because done by only one member.

In U. S. *v.* Standard Oil Co., 152 Fed., 290, the Court said:

"Perhaps none of the alleged conspirators participates in every part of the conception and of the work of the combination, but every one of them takes his part in the plan or in its execution."

S. P,—U. S. *v.* MacAndrews Co., *et al.*, (Tobacco Trust case) 149 Fed. 823.
Cooley, Torts, 3 ed., p. 213.

We might rest the case upon the propositions thus stated, and the authorities cited. But in view of the importance of the case, and in deference to the opinions of the Courts below, we proceed to consider various objections that have been taken.

FOURTH.

Statute applies to acts done in foreign country. The objection that the acts complained of were done abroad is entitled to no weight.

The parties to the suit are American citizens. The commerce restrained by defendant's acts was foreign commerce of the United States. Congress has full power to legislate in respect to that and has exercised the power in this statute.

In Gibbons *v.* Ogden, 9 Wheat., 1, it was said by Chief Justice Marshall, delivering the judgment of this Court (p. 193) :

"It has, we believe, been universally admitted that these words (to regulate commerce with foreign nations) comprehend every species of commercial intercourse between the United States and foreign nations."

Again at p. 197:

"The sovereignty of Congress, though limited as to its objects, is plenary as to those objects."

The decision in the case of U. S. *v.* Knight, 156 U. S., 1, cited by defendant was based upon the demarcation between the powers of the state and of the federal governments. But in the matter of foreign commerce there are no states. The states are prohibited expressly from making treaties with foreign governments.

Constitution United States: Article I, § 10.

(1) Acts done abroad by citizens of the United States are subject to its jurisdiction and legislative powers.

(2) The commerce of the United States may by its statutes be protected from injury by acts done beyond its boundaries. Both of these powers have been frequently exercised and their validity is established in both criminal and civil cases.

Criminal Cases.

(1) The power of the United States to prohibit its citizens from engaging in the slave trade in foreign countries was never doubted. The act of May 10, 1800, 2 Stat. at Large, 70, made it unlawful for any citizen of the United States, or other person residing in the United States, directly or indirectly, to hold or have any property in a vessel engaged in "carrying slaves from one foreign country or place to another," or to serve in a foreign vessel engaged in slave trade. The Act of April 20, 1808, 3 Stat. at Large, 450, prohibited (§ 4) citizens of the United States from taking on board, receiving or transporting any negro "from any of the coasts or kingdoms of Africa."

These statutes governed the actions of citizens of the United States wherever they might do the forbidden acts.

In the cases arising under these acts it was never doubted that Congress had jurisdiction to prohibit citizens of the United States from engaging in that trade, although it was lawful by the laws of Africa, where the negroes were taken, and for many years lawful in other countries.

U. S. *v.* Gordon, 5 Blatchf., 18.
The Slavers (*Kate*), 2 Wall., 350.

Similar statutes prohibiting other acts of piracy are held valid.

U. S. *v.* Pirates, 5 Wheat., 184.

(2) The Act of January 30, 1799 (1 Stat., 613), re-enacted in section 5335, Revised Statutes, and in section 5 of the Penal Code of March 4, 1909, provides:

"Every citizen of the United States, whether actually resident or abiding within the same or, *in any foreign* country" who carries on correspondence with a foreign government with intent to influence its action in any controversy with the United States or to defeat the measures of the government of the United States, shall be punished by fine and imprisonment.

Article 35 of the Complaint (p. 24) alleges that "all of the acts above set forth were done by the defendant in pursuance of the contracts, combinations and conspiracies aforesaid. Said contracts, combinations and conspiracies *and the acts done thereunder* were done for the purpose of restraining and they did in fact restrain trade and commerce with foreign nations."

Among these acts were the instigation and inducement of Costa Rican soldiers and officials to seize plaintiff's plantation and property, and to prevent it from exporting bananas to the United States. This instigation and inducement were a correspondence with the government of a foreign country to defeat the measures of the government of the United States. It cannot be disputed that the Sherman Act is a measure of that government.

"The political department of the government has clearly manifested its will, in the form of an express law."

Mr. Justice Gray in
U. S. *v.* Rauscher, 119 U. S., 407, 433.

Again in Article 31 (pp. 22, 23) the complaint avers that defendant before the Government of Costa Rica has opposed and thwarted plaintiff's efforts to procure the officials to withdraw from its plantation so that it might continue its business of exporting bananas to the United States, "and has urged the Government of Costa Rica to continue such forcible seizure and occupation of plaintiff's plantation, railway and other property."

These acts also were a violation of the Act of 1795. Yet the Court below has overlooked the fact that these acts were in violation of the laws of the United States, and has held that they were immune because committed through the instrumentality of a foreign government.

That is only an aggravation of the offense.

Civil Cases.

(3) It has uniformly been held that the Harter Act applies to bills of lading issued in foreign countries for the transportation of goods to the United States even though the transportation be in foreign vessels.

In The Carib Prince, 170 U. S. 655, the vessel was a British steamer, and the bill of lading was signed at Trinidad, a port governed by the Brit-

ish law. Yet it was held that the provisions of the Harter Act were applicable.

S. P. The Silvia, 171 U. S., 462.
The Chattahoochee, 173 U. S., 540.

The language of the Sherman Act is as comprehensive as that of the Harter Act. In the Northern Securities case (193 U. S. 337) the court speaks of this statute as a rule prescribed by Congress "for interstate and international commerce." It guards such commerce against acts which threaten it, no matter where they are done, and more especially if they are done by citizens of the United States.

Thomsen *v.* Union Castle Co.,
166 Fed., 251.

Half the purpose of the act would be defeated if it were held that international commerce is protected by it only against acts done in this country. Combinations in restraint of trade might be made by American citizens abroad, and no matter how serious the restraint of trade resulting therefrom, Congress would, under the theory of defendant, be powerless.

Indeed, without the aid of a statute, this Court has uniformly held in suits against common carriers that it would, in determining the validity of contracts made with them, or their liability for torts committed by them, apply the American and not the foreign law; and enforce the policy of American law.

Liverpool & G. W. Co. *v.* Phenix Ins.
Co. (the Montana), 129 U. S., 397.

In this case the carrier was a British ship, the voyage was to end in Liverpool, the tort was committed off the coast of Wales, and yet the American law was enforced.

The decisions in the cases cited rest upon the general principle,—that a legislature which has the right to regulate commerce may regulate it from start to finish. The legislative power of the Congress of the United States is not restricted to acts done within its territorial jurisdiction.

"Cases can easily be conceived in which a person, whose residence is outside a territory, may make himself, by conspiring extra-territorially to defeat its laws, intra-territorially responsible. If a forger, for instance, should establish on the Mexican side of the boundary between the United States and Mexico a manufactory for the forgery of United States securities, for us to hold that when the mischief is done he would not be liable to arrest on extradition process, and that he could afterwards take up with impunity his residence in the United States, would not merely expose us to spoliation, but bring our government into contempt."

Wharton Crim. Law § 278.

That is what the decision below does.

Defendant's argument in effect is that the Sherman Act cannot give a remedy for acts committed by a citizen of the United States in a foreign country. This argument overlooks the distinction between the power of Congress over American citizens, and its power over foreigners. It can by appropriate legislation bind citizens of the United States everywhere.

"A State has the right to attach whatever consequences it chooses within its own territory to acts of its subjects, wherever those acts may be done."

Hall on International Law, 5 Ed., 202;
1 Oppenheim International Law, 195;
Wharton Criminal Law, Section 271.

FIFTH.

Decision does not involve pronouncing an act of Costa Rica to be unlawful.

The Court below seems to have assumed that it could not give judgment for damages done by American conspirators, because a foreign government was party to the conspiracy alleged, and that the Sherman Act does not extend to acts to which a foreign government is a party.

We have shown that there is no such limitation in the Sherman Act.

We reply further—The conspiracy was wholly independent of Costa Rica. Its officials were mere tools of defendant.

The complaint does not charge that Costa Rica or its officials acted maliciously to plaintiff. A guilty defendant may employ an instrument whose act may itself be innocent. Defendant's

liability for procuring such act may rest upon circumstances quite apart from the intrinsic character of the act itself.

Under the Sherman Law it has been often held that the act of combination is the element which gives to the acts complained of their illegal character. It is immaterial whether those acts are lawful or unlawful in themselves if done by a single person. They become actionable when done in combination, and for the purpose of stifling commerce.

In Swift *v.* U. S., 196 U. S., 375, this Court said (page 396):

"It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.

S. P. Aikens *v.* Wisconsin, 195 U. S., 194, 206."

The same rule was applied by this Court to a suit for triple damages under the Sherman law, in Loewe *v.* Lawlor, 208 U. S., 274.

At p. 298 this Court said:

"The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

S. P. Trans-Missouri Freight Case, 166 U. S., 290.

Loewe *v.* California State Federation, 139 Fed. Rep., 71.

Farmers Loan & Trust Co. *v.* N. P. R. R., 60 Fed. Rep., 803.
Rourke *v.* Elk Drug Co., 75 N. Y. App. Div., 145.
Quinn *v.* Leathem (1901), Appeal Cas., 495.

S. P. Shawnee Compress Co. *v.* Anderson, 209 U. S., 423.

Here it was held that a lease, in itself innocent, became unlawful and void if executed as part of a scheme to monopolize the industry of compressing cotton, in violation of the Sherman law.

It is therefore immaterial whether or not the action of Costa Rican officials was unlawful. It is admitted, on this record, that the defendant was a party to an unlawful combination with divers American citizens; that that combination endeavored to put the plaintiff out of business for the purpose of destroying its competition and effecting a restraint and monopoly of foreign commerce in bananas, and that one of the means resorted to for that purpose was the procuring of the Costa Rican officials to eject the plaintiff from its plantation and railway. Even if this was lawful as between Costa Rica and plaintiff, the fact that it was done at defendant's instance as a means of destroying plaintiff's property and business for the sake of restricting trade and perpetuating defendant's business monopoly, makes defendant liable for damages caused thereby. The court is not called upon to pass judgment on Costa Rica but to hold that defendant is liable, if in pursuance of objects forbidden by American

law it instigated the Costa Rican government or its officers to do injury to plaintiff's property or business. Its procurement of officers of a foreign government to do the act is an aggravation.

As this Court said in

Angle *v.* Chicago, St. P. & Omaha R. Co., 151 U. S., 1, 13,

"It is enough that the Portage Company did break down; that it broke down in consequence of these wrongful acts of the Omaha Company, and that they were resorted to by the latter with the wrongful intention of breaking it down."

SIXTH.

Defendant did the wrong. The Costa Rican officials were its instruments.

The opinion of the Circuit Court of Appeals states that the relation of these officials cannot "from the very nature of things be that of principal and agent" (p. 109). No authority is cited. Unfortunately the "very nature of things" does not prevent a weak government from becoming the tool of a powerful foreigner. History is full of such examples. It is not necessary to hold that this government was agent for defendant. In the Angle case, 151 U. S., 1, the Legislature was not agent for defendant, but the latter was held liable for procuring the passage of an act. But the law of agency does furnish illustrations.

The allegation here is that the acts in question were instigated and induced by defendant (Ar-

ticle 27, pp. 19, 20); and were really done by it (Article 37, p. 25).

These allegations are admitted by defendant. What right had the Court below to say that "in the nature of the case" this could not be?

"A corporation has the same power as a natural person to act as agent for another."

7 Am. & Eng. Encyc. Law, 809.
Mechem on Agency, § 64.
Killingsworth *v.* Portland Trust Co., 18 Oregon, 351.

The disability of the agent is not defense to the principal.

Lyon *v.* Kent, 45 Ala., 656, 663.
Story on Agency, § 7.
Clark & Skyles on Agency, 66.

Thus a husband is bound by an act done by his wife as agent, though she was incompetent to contract herself.

Brown *v.* Brown, 174 Mass., 197, 201.
Hopkins *v.* Mollinieux, 4 Wend., 465.

In short the rule is fundamental in the law of agency: *Qui facit per alium, facit per se.* In all Mr. Broom's learned discussion of this maxim there is no suggestion that the principal may take advantage of the agent's disability.

SEVENTH.

Costa Rica's immunity from suit has no bearing on defendant's liability.

Defendant insists that action against it will not lie because *the Republic of Costa Rica* cannot be sued in the courts of the United States. It is a novelty for a defendant to plead as a defence the immunity from suit of one not a party to the action. It would be strange if a foreign state could grant immunity to an American citizen for its violation of the laws of the United States. The Circuit Court, however, specifically so held (p. 77):

"If the act complained of was done by Costa Rica, it is of no moment that the defendant and that Republic were joint tort feasors. There was but one tort, and if one offender can be sued it is of the essence of the doctrine that the other must be equally suable. But neither Costa Rica nor its officers could be brought into our courts, for reasons fully and forcibly set forth by Wallace, J., in Underhill *v.* Hernandez, 65 Fed. Rep., 581, affirmed in 168 U. S., 250."

This holding is erroneous in two particulars,—

(1) On the complaint Costa Rica is defendant's instrument, not joint tort-feasor.

(2) The immunity of one of two joint tort feasors is not a defense to the other.

It is said by the Circuit Court that it is of the essence of the doctrine (of joint tort feasors) that both must be equally suable. There is no authority for holding that a man can commit wrongs

with impunity, if he acts with the aid of a non-suable partner. *Qui facit per alium facit per se.* A man should not be able to do wrong through the agency of an immune instrument, and then claim the benefit of the instrument's sanctity. An American citizen, subject to American law, ought not to be allowed to induce a weak or corrupt government to aid him in stifling the foreign commerce of the country and then to shield himself and defeat the law, by pleading his accessory's sovereignty.

The Circuit Court overlooked the distinction between the meaning of the word "joint" in contract and in tort. Where the foundation of the right is in contract, and where the liability so assumed is joint, the plaintiff's remedy must be against the obligors jointly, though even there he need not serve both with process. In contract, the relation is voluntarily created. The obligee accepts the obligation as joint. If he release one obligor, the other is released. If one obligor pays the debt, he has contribution against the other.

Erwin's Lessee *v.* Dundas, 4 How., 58, 78.

Connecticut Fire Ins. Co. *v.* Oldendorff, 73 Fed., 88.

Mason *v.* Eldred, 6 Wall., 231.

Freeman, Judgm., § 231.

The expression "joint" has a different meaning when applied to contract and to tort. In such phrases as "a joint contract" or "a joint debt," the word "joint" characterizes the *obligation.* The obligation is one and indivisible. Judgment must be rendered against both joint debtors, even if one only be served with process. But when we speak of a "joint tort" or of "joint tort feasors,"

we mean not that the *obligation* is joint, but that the *tortious act* was joint. Joint tort feasors are those who have united or co-operated in the commission of an actionable wrong, but, while there is but one tort, still the *liability* arising from it is several.

Sessions *v.* Johnson, 95 U. S., 347, 352.

The law endeavors to give a remedy to one who has sustained damage, and has, unwillingly, been brought into relation with the wrongdoers.

"*While the wrong is joint it is also in contemplation of law several;* the wrong of one man in beating another is not the less his personal wrong because of a third person having held the assaulted party while another delivered the blows, or because still others stood by, and by force or threats prevented the intervention of the police. The officer who serves a void writ is not the less an individual wrong-doer, because of the magistrate being liable for having issued it. And while in such cases the person injured may pursue all, so he may pursue any number of those who are legally chargeable with the wrong."

Cooley, Torts, 3 ed., p. 224.
See also *id.*, p. 226.
Union Stock Yards *v.* Chicago &c., R. R., 196 U. S., 217.
Sessions *v.* Johnson, 95 U. S., 347.

Defendant's argument assumes that courts mould their procedure to protect the guilty. The contrary is the rule. They administer justice by redressing the wrongs done by the guilty to the innocent. *Ubi jus ibi remedium.*

Chappell *v.* Jardine, 51 Conn. 64.

A few concrete illustrations may emphasize the injustice of the rule announced by the Circuit Court. Suppose one of two joint tort feasors died, and thereby became non-suable. His executor could not be a party. Would that release the other? Suppose one of the parties to the commission of a tort, where a particular intent is an essential element, were insane. An insane person, not being capable of entertaining the intent, would not be liable (Cooley, Torts, 3rd Ed., pp. 176, 177). Would that fact be a defence to the others?

In 1 Wharton on Crimes, §207, it is said:

"A party, also, who acts through the medium of an innocent or insane medium or a slave, is guilty, though absent, as principal in the first degree; while he would be guilty only as accessory before the fact at common law were the agent a responsible and conscious confederate."

In Section 211b Wharton continues:

"Nor is it necessary that the principal in the second degree should be personally capable of committing the offense."

It is well settled that an officer armed with illegal process, or one who goes to illegal lengths in the execution of his process, is liable in trespass, and that the person at whose instance the illegal writ issues, or the illegal acts are done, is similarly liable. The latter cannot shield himself behind the immunity from suit of the Court out of which the writ issued. So here, the question of Costa Rica's immunity need not be considered. The officers who did the acts are beyond the reach of the court's process. But the corporate individual

who instigated them is here and in court. If that corporation has violated the statutes of the United States, why should the character of its associates shield it? It would be no defence to an indictment under the Sherman Law to say that some of the acts forbidden by that statute had been done with the aid and complicity of a foreign government. That would only make the crime more heinous. Why, then, is a similar plea a defence to a civil suit?

If a man employ an innocent agent to administer poison to another, the innocent agent would not be indictable, and, if he acted without negligence, would not be civilly liable, but there could be no question that his principal would be liable, both criminally and civilly. If a man induce an ambassador to commit a wrong, or participate with him in doing it, unquestionably that man is liable to suit even though the ambassador might be protected by his character as such.

EIGHTH.

The complaint sets forth an actionable combination in violation of the Sherman Act.

Section 7 of the Sherman Act provides that a person whose property or business is injured by any person or corporation by reason of anything forbidden by Sections 1, 2 or 3 or the Act may sue therefor in any Circuit Court of the United States where the defendant resides or is found.

Defendant was a member of the combination set forth in the complaint. This suit was brought in a Circuit Court of the United States for the Southern District of New York" where defendant "has a regular office and place of business (p. 6, fol. 18; p. 42, fol. 125). It was found within that jurisdiction and appeared and answered on the merits (pp. 27-42).

Defendant on the record admits the allegations of the complaint. These are:

The entrance by defendant into illegal contracts and its participation in a combination or conspiracy forbidden by law (Complaint, articles 3-20 pp. 6-17; 34, 35, 36, pp. 23-25).

The ownership by plaintiff of certain property and business in Panama (Articles 26, 27, 37, pp. 19, 20, 25) and of the franchise to export to and sell in the United States (Articles 1, 37; pp. 6, 25).

Injury and damage to the plaintiff's property and business, by the illegal combination (Articles 28, 29, 30, 34, 36, 37; pp. 20, 21, 22, 23, 25).

The complaint contains a preliminary statement showing the state of the banana importing business prior to defendant's organization,—that many persons and companies were engaged in it and that active competition, producing reasonable prices, existed. This statement is in the Third, Fourth, Fifth and Sixth Articles of the complaint (Record, pp. 7, 8).

Thereafter the following different modes of combination and conspiracy are alleged:

1. The purchase by defendant of the property and business of certain of the competing companies and the exaction by defendant of a covenant that the sellers should not further engage in the business, "whereby the competition was ex-

tinguished." These acts were done by defendant in the years 1899 and 1900 "for the purpose of controlling and monopolizing the trade of importing bananas into the United States, and to regulate the prices at which such fruit should be bought and sold, and to prevent competition in the purchase and sale of such fruit" (Complaint, Articles 7, 8; Record, pp. 8, 9).

2. Defendant made with certain specified competitors contracts

"for the regulation of the quantity of bananas to be purchased and sold by each, and for the regulation of the price at which such fruit was to be purchased, and for the manner of selling the same, so as to prevent competition between said companies and the defendant * * * in the prices at which such fruit was to be sold and so as to restrain and monopolize the said trade in such fruit and to give the defendant the control of their business, and they did thereby prevent such competition, and did restrain and monopolize the trade in said tropical fruit between Central America, South America and the West Indies on the one part and the United States of America on the other."

Articles 9, 10, 12, pp. 9-11.

The companies with whom such arrangements were made "constitute the great majority of the important companies importing bananas into the United States" (p. 11, fol. 31).

Such contracts violate the Sherman Law. They are the "unified tactics with regard to prices," which this court condemned in

National Cotton Oil Co. *v.* Texas, 197 U. S., 115, 129.

In the Beef Trust case,—United States *v.* Swift, 196 U. S., 375—regulation of prices and supply was held violative of the Sherman Law. The same was held in Gibbs *v.* Consolidated Gas Co., 130 U. S., 396.

S. P. The Addyston Pipe Co. Case, 175 U. S., 211.

There the defendants agreed among themselves on prices, and it was held that such fixing of prices was illegal, irrespective of their reasonableness.

S. P. United States *v.* Chesapeake & Ohio Fuel Co., 105 Fed., 93.
Whitwell *v.* Continental Tobacco Co., 125 Fed., 454, 459.
United States *v.* Coal Dealers Assn., 105 Fed., 93.

3. Combination through the medium of the Fruit Dispatch Company (Articles 11, 16, 17; pp. 10, 13, 14). Defendant organized a corporation known as the Fruit Dispatch Company, all the capital stock of which is owned by defendant. It was thereupon agreed between defendant and the various corporations mentioned in the earlier articles of the complaint that "all the bananas imported by them, or either of them, should be sold at fixed prices through the Fruit Dispatch Company, as the common agent of all of them. The purpose and effect of said contract was to give the defendant control of all sales of fruit belonging" to all the combined interests. When by the competition alleged in the Thirteenth Article, the importing firm of Camors, McConnell & Company was reduced to submission, one of the terms im-

posed on it was that it should, in the same way, put its sales exclusively in the hands of the Fruit Dispatch Co. (Article 16; p. 13). The Seventeenth Article alleges the making of similar contracts between the Fruit Dispatch Company and various other importers, "by which contracts the amount of such tropical fruit imported into the United States was regulated and the prices at which such fruit should be bought and sold as aforesaid were controlled." Through the power thus acquired, the Fruit Dispatch Company could and did force upon fruit buyers in the United States long term contracts that they should buy only from the Fruit Dispatch Company, whereby that company "was enabled to regulate prices in that market, and deprive any other importers of bananas that there might be from finding purchasers for their fruit" (p. 14, fol. 42).

In short a corporation, owned by defendant, fixes prices, regulates supply, and makes the sales for the allied companies. Instead of the former competition in sale, defendant has the entire disposition of the combined product. No form of combination could be more effective in stifling competition, more unified in its action, or more obnoxious to the statute. The same general scheme has been frequent in the form of pricing committees, traffic pools, &c., and it has always been condemned by the courts.

United States *v.* Joint Traffic Asso.,
171 U. S., 505.

This Court (p. 564) concisely points out one of the evils resulting from such a combination.

"A company desirous of deviating from the rates agreed upon and which its associates desire

to maintain, is at once confronted with this probability of a war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus the power to commence such a war on the part of the managers would operate to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member."

S. P. Gibbs *v.* McNeeley, 118 Fed., 120.

National Harrow Co. case, 76 Fed., 667; aff'd 83 *Ib.*, 36.

U. S. *v.* Chesapeake & Ohio Fuel Co., 105 Fed., 93; aff'd 115 *Ib.*, 610.

4. A specific combination between the defendant and the firm of Camors, McConnell & Company, who had been independent and competing importers and sellers of bananas. (Articles 13-17; pp. 11-14.) After carrying on for a time a destructive competition with them, defendant proposed to that firm to enter into an agreement which would make their business "part of said combination, and to this end proposed to them the organization of a new corporation, to be known as the Camors-McConnell Company, a majority of the stock of which should be held by the defendant" (pp. 11, 12; fols. 33, 34). It also had a majority of the directors (pp. 12, 13; fols. 36, 37). The quantity of fruit to be imported by the new cor-

poration, and the prices for purchase and sale were to be regulated by agreement, and the Fruit Dispatch Company was to be made the exclusive selling agent of the new corporation. "The purpose and effect of said contract was to give the defendant control of all sales of the fruit of said Camors-McConnell Company" (p. 14, fol. 40). The offer embodied in these proposals was accepted, and agreements were accordingly drawn up, executed and carried out.

The combination thus effected is for the purpose of restraining trade. It is forbidden in the Sherman Act, and has specifically been held illegal by the Circuit Court of Appeals for the Fifth Circuit.

McConnell *v.* Camors-McConnell Company, 152 Fed., 321.

5. Combination by stock ownership (Article 17A, pp. 14, 15). Defendant, between its organization and the beginning of this suit, acquired a controlling interest in the stock of seven corporations. Each of these had been, as appears from Articles 4, 5 and 6, importers and sellers of bananas and competitors with the defendant. Article Seventeen A also specifically alleges (p. 15, fol. 44):

"Said corporations, before defendant acquired the control of them, had been respectively competing with defendant and each other in the business of buying and raising bananas in foreign countries and importing bananas into the United States and in selling the same in the United States. * * * After defendant acquired such control, from time to time the said corporations

respectively ceased to compete with each other and with defendant in the business aforesaid."

The stock ownership was, for the most part, concealed by the use of dummy stockholders, and defendant's officers and agents were put into the boards of directors of the various companies so combined with defendant, giving it a majority in the respective boards (p. 15, fols. 43, 44).

Such combination has transformed half a dozen independent and competing corporations into one combination, dominated by defendant. The old corporations retain their corporate form, but all competition has ceased. This is illegal.

Northern Securities Case, 193 U. S., 197.

In this case the Circuit Court said (120 Fed., 721, at p. 725):

"It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock."

The Court looked behind the curtain of separate corporate entities to see what the real parties in interest—the stockholders—were doing.

Defendant argued that such a purchase of stock was not forbidden, and cited as authority Davis

v. Booth, 131 Fed. Rep., 31. This is an authority for the plaintiff. It was an appeal from an order granting a preliminary injunction to restrain the breach of a contract. The appellant's contention was that the contract was illegal because it involved the purchase of a business, and a vendor's covenant not to compete. The Court overruled this contention, and held that such a covenant, accompanying a *bona fide* sale was lawful, and said:

"There is a clear distinction which seems to be lost sight of in the argument here, between the aggregation of properties by purchase where the seller no longer retains an interest in the property" (which was the case before the court), "and a combination of owners and properties under one management, where such owner's interest is continued in the combination."

The former transaction, the court pronounced lawful; the latter is the case at bar. The court cites United States Capsule Co., 67 Fed., 414, where such an arrangement is specifically held unlawful.

Article 17A of the complaint alleges purchases of "a *controlling interest.*" That means a majority of the stock, but not the whole. It accomplished just what the court in Davis *v.* Booth inferentially condemned,—"a combination of owners and properties under one management, where each owner's interest is continued in the combination."

This appears even more clearly in the instance of the Camors-McConnell Company, where the defendant's interest is specifically shown to be

one share more than half (Complaint, Article 14, p. 12, fol. 36).

6. The actual torts committed by defendant against plaintiff were done as a part of the illegal combination enumerated above. (Articles 20, 35, 36, pp. 16, 24, 25.) The last two are as follows:

"*Thirty-fifth.*—The aforesaid contracts, combinations and conspiracies were entered into by the defendant for the purpose of restraining trade and commerce with foreign nations and among the several States and were combinations and conspiracies for that purpose. All of the acts above set forth were done by the defendant under and in pursuance of the contracts, combinations and conspiracies aforesaid. Said contracts, combinations and conspiracies and the acts done thereunder were done for the purpose of restraining and they did in fact restrain trade and commerce with foreign nations, and among the several States."

"*Thirty-sixth.*—Said United Fruit Company, in manner and form as aforesaid, has attempted to monopolize and has monopolized and has combined with other persons and corporations hereinbefore mentioned, to monopolize part of the trade and commerce among the several States of the United States and its trade with foreign nations, and especially the trade in bananas between Central and South America and the West Indies and the United States, and the plaintiff has been injured in its business and property thereby and its business has been broken up and destroyed."

These allegations bind the various acts of the defendant into a single scheme to restrain and monopolize international and interstate commerce in bananas by means of the contracts and

combinations set forth in the complaint and to break up, injure and destroy plaintiff's business and property.

In Swift & Co. *v.* United States, 196 U. S., 375, this Court said (p. 395):

"But, after all the specific charges, there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meat throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill."

NINTH.

Injuries done by this combination actionable even if reference to acts Costa Rican officials be omitted.

1. The Circuit Court of Appeals holds that all this is not actionable, because it inferred, without any allegation to that effect, that the plaintiff's principal business was to be done by the raising of fruit on its own plantation and the export of such fruit to the United States (Record, p. 107), and concluded that there could be no recovery for any other violation of plaintiff's rights. This conclusion is fundamentally erroneous.

Where the allegations of unlawful conspiracy to injure the plaintiff are clear, there is no necessity for specific allegation as to the manner by which this injury is to be accomplished. The

plaintiff's right of action, is clear, even if the articles from twenty-three to twenty-five and article twenty-seven should be taken out of the complaint.

How is it possible to maintain the proposition of the opinion below (p 107)? "The allegations are too indefinite and uncertain to state a cause of action based upon an independent and separate demand." The analysis of the complaint already made shows that the allegations respecting the conspiracy and its illegal character are definite and certain. Under such circumstances the law implies damage. The amount of this damage is to be ascertained by the jury.

"Although *damnum absque injuria* is a matter of frequent occurrence, yet *injuria absque damno* may be said to be unknown to our law; for 'a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right.' Per Holt, C. J. Ashby *v.* White, 2 Ld. Raym., 955."

Broom, Legal Maxims, 157;
Scott *v.* Donald, 165 U. S., 58, 86;
Fulton *v.* Norton (1908), A. C., 451.

In short, the Court below entirely overlooked the fact that there are distinct allegations in the complaint of a combination to monopolize the trade in bananas between Central America and the United States, and to drive the plaintiff out of business, and that the plaintiff has been driven out of business. Whether or not, therefore, the conduct of the Costa Rican officials was an element in this is irrelevant. At most, it was a part, and not the whole, as the Court below erroneously assumed.

The allegations of the complaint are sufficiently definite and certain. The New York Code of Procedure under which the complaint was drawn requires (Section 519):

"The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties."

If the allegations were uncertain and indefinite, the remedy of the adverse party is by motion to make them more definite and certain (New York Code of Civil Procedure, Section 546):

"Where one or more denials or allegations, contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the Court may require the pleading to be made definite and certain by amendment."

If the allegations as to damage are too vague, the remedy is by motion for a bill of particulars and not by demurrer (*Ibid.*, Section 531):

"Upon application in any case, the Court, or a Judge authorized to make an order in the action, may, upon notice, direct a bill of the particulars of the claim of either party to be delivered to the adverse party, and, in case of default, the Court shall preclude him from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered."

All of which is only a re-enactment of an old English statute, which, like some other good laws, is so old that it is often forgotten:

Stat. 4 Anne, c 16 §1, quoted 11 East 567.

"For the amendment of the law and the better advancement of justice, the judges are required,

upon any demurrer joined, to give judgment according as the very right of the cause and matter in law shall appear to them, without regarding any defect in the pleading or process, &c., except such as shall be specially set down as cause for demurrer."

The motions provided for in the Code are a substitute for the special demurrer of the common law.

2. It was argued by defendant that some of the acts of combination charged were not unlawful. This argument was especially directed to the allegations that defendant had purchased property and business of several competitors and taken from the sellers covenants not to compete. No doubt at common law, such sales and covenants, if reasonable in scope, were not forbidden. But under the statute "every contract * * * in restraint of trade or commerce among the several States or with foreign nations" is declared to be illegal. Restraint of whatever degree and even acquisition of the power to restrain is forbidden.

Shawnee Compress Company *v.* Anderson, 209 U. S., 423.

Swift & Co. *v.* United States, 196 U. S., 375.

Chesapeake & Ohio Fuel Co. *v.* United States, 115 Fed., 610 (C. C. A., 6th Circuit).

United States *v.* Coal Dealers' Assn., 85 Fed., 252.

Rourke *v.* Elk Drug Co., 75 N. Y. App. Div., 145.

3. Defendant argues that the act does not apply to a combination against producers, but only against importers and sellers. To this we reply

a. Plaintiff was in the business of importing and selling (p. 6, fol. 17). Production was only incidental thereto.

b. The language of the Act is general and not to be restricted by construction (Second Point, subd. 1—*supra*, pp. 9, 10).

TENTH.

Actionable damage to plaintiff's property and business.

In the Court below, defendant argued that no action lay because plaintiff's business had not reached a stage of development sufficient to bring it under the protection of the statute.

The facts are as follows:

(a) In April, 1903, Herbert L. McConnell began to make a banana plantation and to plant bananas, and to build a railway from the plantation to Gadocan, the nearest port, to carry his fruit for shipment to the United States. This he lawfully might do under the laws of the United States of Colombia (Articles 21, 23; pp. 17, 18).

(b) In June, 1904, plaintiff was "formed for the purpose of carrying on the business of buy-

ing and growing bananas in the Republic of Central America, and importing them into the United States and there selling them, and for carrying on such other operations as might be incidental to said business" (Article 1; p. 6).

(c) Plaintiff acquired from McConnell by purchase in June, 1904, this plantation, and the concession to build the railroad. It thereupon expended more than $480,000 in the purchase and completion of the plantation and further construction of the railway, and of a pier at the seaboard end thereof (Article 26, p. 19).

(d) The land and railway in question were in territory awarded to Colombia, September 11, 1900, by an award duly made by the President of the French Republic. The land was in the department of Panama. When this seceded and became an independent republic, its constitution adopted the boundary fixed by this award. The territorial independence of this republic was guaranteed by the United States of America (Articles 23, 25, 27; pp. 18, 19).

(e) Plaintiff was in lawful and undisturbed possession of its plantation and was building its railway and pier, when defendant instigated and induced Costa Rican officials to seize that portion of the plantation which lay on the northerly side of the river Sixola and which afforded the only means of ingress to and egress from the whole of the plantation, to stop the plaintiff's work thereon, and to seize its personal property there located, including railroad and other supplies which had been landed there and to prevent it from importing supplies and from exporting bananas to the United States (Article 27, pp. 19, 20).

(f) Defendant further brought up from Astua an obsolete title to the portion of the land on the left bank of the Sixola and procured *ex parte* and without notice to plaintiff, and in violation of the law of Costa Rica, a declaration from a Costa Rican Court that the land belonged to Astua and his associates. The land was in Panama, and was not within the jurisdiction of the Court. Defendant's agents transferred the title to a corporation known as the Northern Railway of Costa Rica, which was owned and controlled by defendant (Articles 28-30, 12; pp. 20-22, p. 11, fol. 31). The wrongful possession of plaintiff's property, including the portion of the plantation lying on the left bank of the Sixola, has ever since been maintained at the instigation of defendant, and plaintiff has been excluded therefrom; whereby it has been wholly deprived of the use of its property and has been prevented by defendant from buying, growing or exporting bananas to the United States (Articles 31, 37, pp. 22, 25).

"The sole object of the defendant in buying up said alleged title was to prevent the plaintiff from operating its said plantation, or any part thereof, and from having any outlet for the bananas and other fruits produced thereon, and it was done in pursuance of the contracts, combinations and conspiracies aforesaid" (Article 30, p. 22).

When the decision of the court was rendered during the trial, plaintiff moved for an order amending the complaint in certain particulars which were allowed, and also in certain particulars as to which the amendments were denied (p. 62, fol. 185; p. 63, fol. 188; pp. 66-69). No reason

was stated by the learned judge for denying the latter amendments. Presumptively it was because the allegations of the proposed amendments were matters of evidence. The attention of the court is especially called to these amendments, because they show some of the evievidence which the plaintiff would be authorized to adduce in support of the allegations relating to certain judicial proceedings in Costa Rica (Complaint, Articles 29, 30, pp. 21, 22). They show that defendant was the real party in interest in the judicial proceedings in Costa Rica; that in the course of these proceedings defendant gave to the Government of Costa Rica, as a condition of its approval of the award in said proceedings, a bond of indemnity "in and by which the defendant agreed to and did take upon itself the pecuniary responsibility of whatever kind and whatever amount which might be collected from the government of Costa Rica upon the claim of this plaintiff in respect to the said lands or the occupation thereof, and of said railway, and plaintiff's various property, business and other rights there" (p. 68, fol. 303).

The effect of this indemnity of itself was to adopt the action of the government of Costa Rica and make it the act of defendant.

Cooley on Torts, 3 ed., p. 221.
Fleckner *v.* U. S. Bank, 8 Wheat., 338, 363.
Walsh *v.* Cochran, 64 N. Y., 181.

The proposed amendments further show that defendant under this award did take possession of all the land "which had been as aforesaid cultivated and improved by plaintiff upon the north-

erly bank of the Sixola River, and also plaintiff's said unfinished railway and right of way therefrom to Gadocan" (p. 68, fol. 204).

The judgment in Costa Rica was without prejudice to plaintiff's claim (pp. 68, 69, fols. 204, 205).

(*g*) Defendant has, by illegal methods, so far acquired control of the market for the purchase of fruit raised by local planters that plaintiff has been prevented from buying and exporting and has suffered further damage to its railway, crops, floating equipment and plantation, for all of which it demands compensation (Articles 34, 37, pp. 23-25).

It thus appears: (1) Plaintiff had property; (2) it was deprived of that property; (3) this deprivation was at the instigation and inducement of the defendant; (4) for the purpose of breaking up plaintiff's cultivation and destroying its trade in bananas; (5) in pursuance of and as part of the illegal combination and conspiracy set forth in the complaint; (6) thereby the plaintiff's property was damaged. All these facts are admitted on the present hearing. What more is necessary to a cause of action under the statute?

To this defendant replies that the plaintiff had no going business. If by that is meant that no bananas had yet been received by plaintiff in the United States, it is true.

But plaintiff had a franchise of value—the right to buy and grow bananas in Panama and export them to and sell them in the United States. A franchise is property. The value of this has been destroyed. Moreover plaintiff had obtained the plant necessary to such importation and sale. It had invested large sums of money therein. It

had acquired property, business and the instrumentalities of commerce.

That business was broken up and that property destroyed by defendant in pursuance of its scheme of combination and monopoly. This is within the words of the statute and within the mischief at which the statute was aimed. To hold otherwise would be (1) to strike the word "property" out of the seventh section of the statute; and (2) to say that if an illegal combination acts soon enough and catches its would-be rivals young enough, it may throttle them with impunity.

Such a doctrine is opposed to well-settled rulings of the Federal Courts.

Thomsen *v.* Union Castle Co., 166 Fed. Rep., 251.

United States *v.* Paterson, 59 Fed., 280.

In this case Judge Putnam, in overruling a demurrer to an indictment under the Sherman law, said (p. 283):

"* * * It is sufficient to say that those counts which do allege the existence of such commerce also allege positively knowledge on the part of the defendants; and those which do not allege such existence are sufficient, because neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist. On this point, also, in the opinion of the Court, it is sufficient to use the language of the statute."

The dissenting opinion of Mr. Justice Holmes in the Northern Securites case states that the

Sherman law was designed to meet such cases as this, where would-be competitors are *kept out of business.* He says (193 U. S., at 405):

"* * * The objection * * * was not the union of former competitors, but the sinister power exercised, or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared."

This is in harmony with the prevailing opinion in that case.

Even in a criminal case it was held that the statutory offense of fitting and equipping a vessel for the slave trade "is completed when the preparations for the voyage have reached a stage which shows satisfactorily that the purpose of the fitting and equipment was such as is described in the libel of information."

The Slavers (Sarah), 2 Wall., 366, 370.

The opinion of the Circuit Court in this case gives no effect to the word "property" in the act. It says (Record, p. 78):

"That statute gives no right of action to one who is not deprived of his existing profits, trade or commerce by the formation or action of an unlawful combination or monopoly, but merely prevented from embarking on a new enterprise."

This ignores the word "property." The statute does not say that one who has lost his existing profits, trade, or commerce may sue. It says

that "any person who shall be injured in his business *or property*" may sue.

The Circuit Court of Appeals overruled the Circuit Court on this point.

ELEVENTH.

Plaintiff's Plantation is in Panama. Alleged de facto sovereignty Costa Rica.

Part of the argument under the Second Point (p. 23) is based on the assumption that the illegal acts of defendant through the instrumentality of Costa Rican officials were done in Panama. They were concededly within the territory awarded to Colombia by the award of the President of the French Republic (pp. 18, 19). This vested jurisdiction in Colombia, and Costa Rica lost jurisdiction of the land awarded to Colombia. The Constitution of Panama "declared its northern and eastern boundary to be that laid down by" this award (Record, p. 69).

A. It is a settled principle of international law that an arbitral award made within the jurisdiction of the arbitrator is final, in the absence of fraud. The rule is thus distinctly stated by this Court:

"The object of the treaty was to invest the Commissioners with full power and authority to receive, examine and decide upon the amount and validity of the asserted claims upon Spain for

damages and injuries. Their decision within the scope of this authority is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction."

Comegys *v.* Vasse, 1 Peters, 193, 212.

But we have on this point the decision of another court which is to the nations what the Supreme Court is to the States of our Union,—the Hague tribunal. In the Pious Fund case the point was distinctly taken by the United States that the award of an arbitrator appointed by treaty between two nations was *res judicata.* This contention was unanimously sustained by the tribunal.

Foreign Relations U. S., 1902, Appendix II, pp. 12, 13, 220-222.

The question of *res judicata* was one of the two submitted to the Court by the treaty (*Ibid.*, p. 16).

The reasons of the Court are cogently stated (*Ibid.*, p. 17):

"This rule of *res judicata* applies, not only to the judgments of tribunals created by the state, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the *compromis.*"

"This same principle should, for a still stronger reason, be applied to international arbitration."

The judgment was signed by two such eminent authorities in international law as Sir Edward

Fry and Mons. de Martens, as well as by the other three Judges of the Court.

It hardly seems necessary to cite at length text writers in support of the same proposition. As M. Merignhac (La Conference Internationale de la Paix, p. 296) says:

"Tous les auteurs sont unanimes à reconnaitre que la sentence de l' arbitre est un jugement, qu 'elle a l 'autorité de la chose jugée; et à cet égard on pourrait multiplier les citations."

This is cited by Judge Penfield in his able brief in the Pious Fund Arbitration.

U. S. Foreign Relations, 1902, App. II, p. 221.

He summed up the whole matter in one happy sentence in his argument (*Ibid.*, p. 807):

"An international award has the force of *res judicata.*"

In the Hague Convention the rule of International law on this subject is thus summarized (Art. LIV):

"The arbitral judgment duly pronounced and duly notified to the agents of the litigant parties, decides the dispute finally and without appeal."

The United States has always been foremost among the nations of the world as an advocate of arbitration. It has resorted to this means of settling disputes more often than any other power. It has uniformly pressed its adoption upon other nations. Now that others have responded, that the

Hague Court has been established and that arbitration seems the destined solution of international disputes, it is of peculiar importance that the finality of its decrees should be maintained by the United States.

Secretary Bayard thus states the position of the United States upon this question:

"With respect to the objection to the decision of the arbitrators that it is not altogether sound in law, it is to be noticed that under the convention under which the United States and Spanish Claims Commission was organized the two governments expressly agreed that they would accept the awards made in the several cases submitted to the proposed arbitration as final and conclusive. This provision was adopted by the contracting parties as an essential part of the arrangement for the settlement and disposition of claims, and with the understanding that it was to be kept as faithfully as any other provision of the treaty."

Secretary Bayard to Mr. Rodriguez,
Mar. 22, 1886.

B. The present is a case where it is peculiarly important that the controversy should not be reopened:

(1) Because of the long standing of the dispute and the frequency with which it has been brought before the United States. For thirty years there were constant invasions of disputed territory, and resulting strained relations, between Colombia and Costa Rica. As long ago as 1879 Mr. Dickman writes to Secretary Evarts under date of August 14, as follows (For. Rel., U. S., 1880, p. 310):

"Lately the long standing dispute which exists between Colombia and Costa Rica concerning the boundary between the latter Republic and the State of Panama * * * appears to have entered upon a new stage, as an invasion of Colombian territory, by parties acting under the authority of the Government of Costa Rica, is reported by the Government of the State of Panama.

"The details of the report are very vague, consequently the matter may not be of a serious character, and I only bring the same to your notice as showing the danger to the peace of this Republic which may arise suddenly as long as this question of boundaries is left in its present unsettled condition."

This resulted in the sending of a special envoy by Colombia to Costa Rica (*id.*, p. 325).

(2) Because of the interest which the United States has in the territory of Panama.

By treaty of 1846 with the Republic of Colombia, then New Granada, it is provided:

"Article 35.—The United States of America and the Republic of New Granada desiring to make as durable as possible the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly, and do agree to the following points:

"1st. For the better understanding of the preceding articles it is and has been stipulated, between the high contracting parties, that the citizens, vessels and merchandise of the United States shall enjoy in the ports of New Granada, including those of the part of the Granadian territory generally denominated Isthmus of Panama, from its southernmost extremity until the boundary of Costa Rica, all the exemptions, privileges and immunities, concerning commerce and navigation which are now or may hereafter be enjoyed by

Granadian citizens, their vessels and merchandise * * *."

"* * * The United States also guarantees, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said property."

The treaty of 1904 with Panama gives the United States an even greater interest in the territory of that nation with reference to the construction of an interoceanic canal and in Article I of that treaty,

"The United States guarantees and will maintain the independence of the Republic of Panama."

33 U. S. Stat, at L. 2234.

C. The United States has consistently applied the doctrine of the finality of an Arbitral Award. Secretary Evarts in a report to President Hayes on the request of Mexico to re-open the Weil and the La Abra Mining Company claims, after their decision by the Mexican Claims Commission, said (April 13, 1880, Senate Rep., 1630, p. 74):

"The principle of the settlement of international differences by arbitral commissions is of such deep and wide reaching interest to civilization, and the value of such arbitration depends so essentially upon the certainty and finality of its decision, that no government should lightly weaken its influence or diminish its consideration by making its action the subject of renewed discussion."

D. Finally the President of the French Republic was made arbitrator by treaty between Colombia

and Costa Rica dated November 4, 1896 (Record, p. 18). By article 4, paragraph 6, it was provided that:

"The arbitrator's decision, whatever such may be, will itself serve as a complete and binding treaty between the two high contracting parties, and will admit of no appeal whatsoever. Both parties bind themselves to a faithful fulfillment and to resign all claims against the decision, staking thereon their national honor."

In the court below defendant submitted a certified copy of a letter of the United States Secretary of State to the United States Ministers in Panama and Costa Rica, dated April 16th, 1906. This letter supports the complaint. It expressly states:

> "It is undeniable that the *de jure* sovereignty has been in Colombia and Panama since the Loubet award, accepted as it is by Panama and Costa Rica."

Under these circumstances the law of Panama must govern the acquisition and passage of title to that land. On the face of the complaint it appears that plaintiff was in peaceable possession and cultivation of its plantation in accordance with the laws of Panama (p. 19, fol. 56). Its title has never been divested according to those laws.

The Court below relies on a statement in this same letter that "Costa Rica exercises a *de facto* sovereignty over to the territory included in the McConnell concession, subject of right to diverted at any time at the will of Panama, (p. 107). But is immaterial whether or not Costa Rica had a *de facto sovereignty*. Destruction by defendant,

or persons acting at defendant's instigation, of plaintiff's property or business, as part of a scheme to restrain commerce, is equally actionable whether the *de facto sovereignty* is in Panama or Costa Rica.

The letter referred to states expressly:

"As Panama cannot rightfully deprive possessors of title properly acquired under Colombian laws which remained in force after the secession of Panama, without due process of law it would be equally unjust for Costa Rica to attempt to do the same thing."

"But the ultimate attributes of sovereignty belong to the ultimate owner, and for this reason it is proper that Panama should see to it that rights and titles which have accrued concerning lands within this area should not be prejudiced by the state having accidental and temporary jurisdiction."

The Secretary of State of the United States could not say less. For the treaty by which the United States recognized the independence of Panama, guaranteed the territoral independence of that Republic (p. 19) *ante*, p. 73.

Even if the Department had ruled otherwise (which it has not) this Court has held that it is part of its great jurisdiction to construe treaties made by the United States with foreign powers, and to protect individual rights of property secured thereby, even against the United States itself.

United States *v.* Percheman, 7 Peters 51.

Mitchel *v.* United States, 9 Peters 711.

This shows the fundamental error of the Court below. The Courts of the United States are not merely municipal Courts. They have authority to declare that a statute in violation of the constitution is void. They have jurisdiction of all cases arising under the constitution and laws of the United States and "*of treaties made or which shall be made under their authority*" Article III, Section 2. This Court has jurisdiction of controversies between the States. No English or Continental Court has any such jurisdiction as this. Any argument drawn from the limitation of their authority is irrelevant.

A treaty is just as binding on the Secretary of State as upon the humblest citizen. It also is part of "the supreme law of the land."

Defendant argues that a decision of the Court in this case may bring the judicial department in conflict with the executive. if this were so, it is the judicial that must control.

But it is not so. The State Department refers the matter to the Courts. Mr. Root's letter, already quoted, "insists that the property of Mr. McConnell, and those whom he represents, be protected and preserved, without any destruction thereof, until such time as the *ultimate rights of the parties* may be passed upon by a court or courts of competent jurisdiction."

TWELFTH.

Action properly brought in the Circuit Court for the Southern District of New York.

Defendant also argued that the action is local and can be brought only where the land lies. This contention is based upon a misconception of its nature. It is not an action of trespass *quare clausum fregit.* It is an action for conspiracy. The fact that one of the overt acts alleged involved a trespass upon plaintiff's realty, does not convert the action into one of trespass.

1. The simplest answer to the contention is found in the statute itself. This specifically provides that "any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden by this Act, may sue therefor *in any Circuit Court of the United States in the district in which the defendant resides or is found.*" The statute does not say that the suit is to be brought in the place *where the property lies, or where the business was transacted.* It gives absolute power to hear the case to the Circuit Court of the district *where the defendant is found,* no matter where the act complained of was done.

The answer admits the allegation that defendant is found within the district (p. 6, fo. 18; p. 27, fo. 81).

2. There is no inherent lack of power in a court to hear and decide an action for damages, no mat-

ter where the acts giving rise to such suit were done.

Sentenis *v.* Ladew, 140 N. Y., 463.

The Court said (page 465):

"We entertain no doubt that the supreme court had jurisdiction to render the judgment awarded in this action. Under the constitution it has general jurisdiction in law and equity, and of the class of actions to which this cause belongs. It is not prohibited by any statute from entertaining jurisdiction of a suit for damages for injuries to real property in another state."

In Companhia *v.* British South Africa Company (1892), 2 Q. B., 358, 394, Lord Esher said:

"The question whether the courts of a nation will or will not entertain jurisdiction of any dispute is to be determined exclusively by the nation itself,— that is by its municipal law. If by express legislation the courts are directed to exercise jurisdiction, the courts must obey."

The rule which has been applied in some cases to actions of trespass is not based on any lack of power in the court. Where an act of Congress specifically confers the jurisdiction, the court has no right to impose exceptions on the unlimited words of the statute. On this point see p. 8 *et seq., supra.*

3. The Sherman Law is not to be strictly construed. An action for damages under Sec. 7 of that Act is not a suit for "a penalty or forfeiture, pecuniary or otherwise."

Chattanooga Foundry, &c., *v.* Atlanta, 203 U. S., 390.

In the Northern Securities Case, 193 U. S., 197, this court at p. 359 quoted with approval the language of the Court of Errors in People *v.* Bartow, 6 Cow., 290:

"It is well settled that a statute which is made for the good of the public ought although it be penal, to receive an equitable construction."

4. Entirely apart from the statutory provision the objection is not well taken. The gist of the action is neither ejectment nor trespass. It is not even alleged that plaintiff owned the plantation in fee, but that under the law of Panama McConnell had the right to make it and plant bananas there, that plaintiff had acquired this right and that under the laws of Panama it was in peaceable and undisturbed possession thereof, and had the right to build its railway and pier (pp. 17, 19).

The action is for conspiracy to ruin the plaintiff's business and property. The conspiracy was organized in the United States. *The common law remedy would not have been trespass but an action on the case.* Many acts are alleged in the complaint, done in pursuance of the conspiracy and directed at the plaintiff, which have nothing to do with the plantation.

An action for conspiracy is not local. The rule sometimes laid down with regard to actions of trespass *quare clausum* has been narrowly confined to such actions. The courts have criticised that rule as technical and unjust in many cases, and have narrowed it in every possible way.

Little *v.* Chicago, &c., R. Co., 65 Minn., 48.

5. The destruction of plaintiff's personal property, including railway supplies, is one of the wrongs alleged in the complaint. The prevention of purchases from independent dealers in bananas is another. Damages to floating equipment and crops are also alleged. It cannot be contended that any of these causes of action are local.

In Stone *v.* United States, 167 U. S., 178, an action was brought to recover the value of standing timber cut by the defendant from government lands in Idaho. The action was brought in the Eastern district of Washington. Judgment was not asked for the trespass, but for the value of the timber. The title to the land was averred and proved. Nevertheless it was held that the suit was properly brought in Washington. Defendant relied on the case of Ellenwood *v.* Marietta Chair Company, 158 U. S., 105, but the court distinguished that case on the same ground that distinguishes it from the present case, namely, that in the Ellenwood suit the petition presented a single cause of action only, and that for trespass to land, pure and simple.

To the same effect as the Stone case is Peyton *v.* Desmond, 129 Fed. Rep., 1 (Circuit Court of Appeals, Eighth Circuit). There the court held that an action brought for "wrongfully and unlawfully and forcibly entering on land" and cutting timber therefrom was transitory and not local "under the common law distinction."

6. Questions of title are not involved here. The land lay under the *de jure* sovereignty of Panama, and by the laws of that country, plaintiff acquired rights in the land. That being so, no proceedings under the law of Costa Rica could affect the title. Even if the land were transferred to

the *de jure* sovereignty of Costa Rica, rights previously acquired could not be divested and the title to the land would not be altered by the change of sovereignty.

Com. *v.* Chapman, 13 Metc., 68.
Chappell *v.* Jardine, 51 Conn., 64.
Beale, Sum. Confl. Laws, § 9.

This is the position taken by Mr. Root in the letter, already quoted (*ante,* p. 75).

7. Where the defendant voluntarily appears and pleads generally, without raising the objection that the action is local, the objection is waived and the case should proceed to trial.

Sentenis *v.* Ladew, 140 N. Y., 463.
Mostyn *v.* Fabrigas, Cowper 161.

THIRTEENTH.

Damages.

1. Damage to plaintiff's property not speculative.

One error of the Trial Judge has already been noticed. He ignored the claim for damage to the plaintiff's property. The right to recovery for this is clear on the statute, and is not affected by any controversy as to the speculative nature of damages to plaintiff's business.

The measure of damages for the injury to this property in its value in the nearest market.

Eddy *v.* Powell, 163 U. S., 452, aff'g 49 Fed. 807, 814.
Grand Tower Co. *v.* Phillips, 23 Wall, 471.

In the case at bar the nearest market was the United States. The thirty-fourth article of the complaint alleges (pp. 23, 24) that there was no market in Panama in which bananas were for sale for export in sufficient quantities to enable plaintiffs to buy them and ship them by steamer to the United States (fol. 71). Defendant had monopolized the Panama market. Again to the same effect, page 25, folio 74.

2. Recoverable although business just begun.

Apart from the omission to consider this branch of the plaintiff's claim, the learned Judge erred in his ruling that there is no remedy for a wrong which breaks up a plaintiff's business. This ruling is opposed to the fundamental principle that no man shall take advantage of his own wrong. To say that a wrong-doer who successfully seizes a plant in existence and just ready to begin business, and thereby deprives the owner of the profits which would naturally accrue from its use, can do this with impunity, and thereby take advantage of his own wrong, is opposed to this fundamental principle.

In the language of Beasley, C. J., in Hughes *v.* McDonough, 43 N. J. Law, 459, 464,

> "It is admitted upon the record that the plaintiff has sustained a loss by the fraudulent misconduct of the defendant; that such loss was not only likely, in the natural order of events, to proceed from such misconduct,

> but that it was the design of the defendant to produce such results by his act. Under such circumstances it would be strange indeed if the party thus wronged could not obtain indemnification by an appeal to the judicial tribunals."

The Thomsen case cited by the learned Judge has been reversed by the Circuit Court of Appeals, 166 Fed., 251.

The Massachusetts cases cited by him does not support his ruling. There plaintiff had simply an intention to publish a directory. It would be analogous if plaintiff had simply formed a plan to go to Panama. But here we have capital invested, bananas growing and ready to ship, a railway in process of construction.

In cases of unlawful interference with the right to trade or to enjoy property, the law implies damage. It is not necessary to prove special damage.

Bigelow on Torts, 26.
Fulton *v.* Norton L. R. A. C. [1908] 451.
Keeble *v.* Hickeringill (Ld. Holt), 11 East 574.

3. Damages sufficiently admeasurable for an action of tort.

It is well settled that in actions of tort the plaintiff may recover profits or gains which are reasonably shown to have been prevented by the tort and are fairly capable of being admeasured.

1 Sutherland Damages, (3d Ed.) §70, p. 219.

1 Sedgwick on Damages, § 133.
Newark Coal Co. *v.* Upson, 40 Ohio, 17.
Kronold *v.* City of New York, 186 N. Y., 40.
Bergman *v.* Jones, 94 N. Y., 51.
The Mayflower, 1 Brown Adm., 376, 387.
Payne *v.* R. R. & S. S. Co., 38 La. Ann., 164.
White *v.* Mosley, 8 Pick., 356.
The Gazelle, 2 W. Rob., 281.
The Greta Holme, L. R. [1897] A. C. 596, 604.
Carrington *v.* Taylor, 11 East, 570.

In the case at bar, the gains which plaintiff would have made by raising and selling bananas were directly prevented by defendant's tort.

Their amount can reasonably be determined.

There is no business dependent upon cultivation of the earth more certain, than that of growing and selling bananas. The climate is uniform, the soil fertile, the market constant. There are many plantations in Central America similarly situated to that of plaintiff. It is perfectly possible to show, and in fact evidence has already been taken, proving the nature and extent of the production of the bananas in different plantations during the period between the wrong done by defendant and the commencement of the suit. It will be for the jury to adjudge the amount, but the evidence upon which the verdict will be based is capable of presentation with precision much greater than that upon which proof of the profits of a manufacturing business would depend.

There is no ground for asserting that the rule for the recovery of such damages is more strict in cases of tort than of contract. If there be any difference, it is more liberal in actions of tort.

Allison *v.* Chandler, 11 Mich., 542, 551.

At p. 554 the Court said:

"The nature of the case is such as the wrongdoer has chosen to make it; and upon every principle of justice, he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty of accurately estimating the results of his own wrongful act."

The reason is stated by Mr. Justice Holmes, in Globe Ref. Co. *v.* Landa Cotton Oil Co., 190 U. S., 540, 543:

"A man never can be absolutely certain of performing any contract when the time of performance arrives."

4. Damages sufficiently admeasurable even if action on contract.

But even if this were an action on contract, the damages claimed could be recovered.

The leading case in New York on this subject of consequential damages is Passenger *v.* Thorburn, 34 N. Y., 634. This was an action for breach of warranty in the sale of seed. Defendant claimed that the measure of damages was the difference between the value of the seed if it had been as represented, and its actual value. But the Court held that, inasmuch, as it was proved that

the seed was warranted to be genuine, which would produce a particular kind of cabbage, plaintiff could show the probable crop and the value of such product, and that the measure of such damages was the value of the crops less the cost of production.

S. P. White *v.* Miller, 71 N. Y., 118, at p. 133. The Court said:

"Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from a breach."

This also was the case of a growing crop.

S. P. Swain *v.* Schieffelin, 134 N. Y., 471.

A like rule was applied to justify the recovery of commissions to be earned by a salesman "upon reasonable conjecture and probable estimates."

Wakeman *v.* Wheeler & W. Manuf. Co., 101 N. Y., 205.

This case also holds (pp. 212, 213) that the rule as to certainty applies so far as to require plaintiff to show with reasonable certainty that the damages were caused by the breach. But the wrongdoer must suffer from any difficulty in ascertaining the amount.

Nash *v.* Thousand Islands Co., 123 App. Div. (N. Y.), 149.

Taylor *v.* Bradley, 4 Abb. Ct. App. Dec., 363.

Dennis *v.* Maxfield, 10 Allen, 138.

The Mayflower, 1 Brown Adm., 376, 389.
The Gazelle, 2 W. Rob., 281.
Richmond *v.* Dubuque R. Co., 33 Iowa, 422, 502.
Shoemaker *v.* Acker, 116 Cal., 239.

5. Profits reasonably contemplated, even though uncertain, recoverable even in contract.

It is well settled that profits which the plaintiff has been prevented from making, by reason of a breach of contract which prevented him altogether from doing the work contracted for, are recoverable.

United States *v.* Behan, 110 U. S., 338;
Safety Insulated Co. *v.* Baltimore, 66 Fed., 140 (C. C. A., 4th Circuit).
Rice *v.* Whitmore, 74 Cal., 619.

The reason given in these decisions and in the leading case of Masterton *v.* Brooklyn, 7 Hill, 61, which they cite, is applicable to the construction of the statute under consideration. These authorities hold that profits would be recoverable if the defendant had contracted that the plaintiff should be at liberty to engage in the business in question. The object of this statute is to prevent all restraint or monopoly of any part of trade or commerce with foreign nations. The right to carry on such trade is part and parcel of the statute itself, entering into and constituting a portion of its very elements. The right to the enjoyment of such trade is just as clear and plain as any other right

guaranteed by the statute. A right by contract is certainly no more sacred than a right by statute. The measure of damages in an action on a voluntary stipulation surely can be no greater than that given by a remedial statute.

The same measure of damages was applied in an action for negligence. The loss of profits was held recoverable which the jury found would have been made during the suspension of plaintiff's business caused by defendant's wrongful act.

Lacour *v.* New York, 3 Duer, 406.

The same rule was applied in an action for eviction brought by a tenant against his landlord.

Snow *v.* Pulitzer, 66 Hun, 329.
S. P. Port Blakely Mill Co. *v.* Sharkey, 102 Fed., 259.

The action in this case was against a carrier for negligence, in transporting horses. A recovery for the profits which might have been earned by the horses during the time of the delay was sustained. The court at page 263 gives an apt quotation from Cockburn, C. J.: "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility. To some extent no doubt they must be matter of speculaton, but that is no reason for not awarding any damages at all."

This decision was put on the ground that "distinct notice was brought home to the carrier of the nature of the employment which the defendant intended to enter into, and the amount of the earnings which he could make with his horses in that employment."

In the case at bar the defendant knew the nature of plaintiff's business and intended to destroy it. Defendant was engaged in the same business and is presumed to know the profits thereof.

6. Exemplary Damages.

Plaintiff has a right to recover exemplary damages for the injuries alleged in the complaint.

Donald *v.* Scott, 165 U. S., 58, 86.
Press Pub. Co. *v.* Monroe, 73 Fed., 196.

In this case it was held that a corporation would be liable in exemplary damages if the jury found that the circumstances showed wanton disregard of the plaintiff's rights. It was expressly held that such damages were recoverable, although no actual injury to the plaintiff was proved. At page 201 the Court (Peckham, Wallace and Lacombe, JJ.), say:

"That in certain classes of cases juries are authorized to give punitive or exemplary damages to punish a wrongdoer and to deter others from the commission of a like wrong is well settled law in the federal courts and in the courts of this state. Day *v.* Woodworth, 13 How., 370; Railroad Co. *v.* Arms, 91 U. S., 489; Voltz *v.* Blackmar, 64 N. Y., 440. In such cases exemplary damages may be given in addition to what may be proved to be the actual money loss of the plaintiff."

The court further held that the testimony was sufficient to warrant the jury in finding "that the publication of the plaintiff's ode in the World

newspaper was the result of that wanton and reckless indifference to the rights of others which is equivalent to the intentional violation of them. Railroad Company *v.* Arms, 91 U. S., 489."

There is nothing in the Sherman Act to limit this liability for exemplary damages. True, it gives the plaintiff a right to recover treble damages. But if, as the court below held, this right is limited to a recovery of the actual damages proved to have been sustained without regard to the prospective damages which are actual, but which cannot be precisely estimated in money, the remedy would be illusory unless the common law right to recover exemplary damages in the case of wanton or willful injury exists.

When a remedial statute gives a right of action, the right must be measured by the statute. But the quantum of recovery for a violation of this right is to be measured with reference to the provisions of the common law. The statute is not interpolated as an alien element, but becomes an integral part of an existing system.

The Sherman Act is a remedial statute. It was passed to give a more effective remedy than that at common law. But there was a remedy at common law for torts like that alleged in the complaint. When the statute was passed it was not intended in any way to limit existing rights. Its language must be construed in furtherance of justice, and not to deprive a plaintiff of what he would have had in the absence of the provision for treble damages. In other words, under the statute the right to recover treble damages exists in all cases of actual damage whether wanton and malicious or not. The right to recover exemplary damages exists only when the injuries are

wanton or malicious. A deliberate purpose to violate the law will justify a jury in giving exemplary damages.

Willis *v.* Miller, 29 Fed., 238.

FOURTEENTH.

Judgment should be reversed and cause remanded with direction to render final judgment for plaintiff with a writ of inquiry to assess plaintiff's damages.

EVERETT P. WHEELER,
HORACE E. DEMING,
Of Counsel for Plaintiff in Error.

Supreme Court, U. S.
FILED.
APR 8 1909
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1908

No. 686

AMERICAN BANANA COMPANY . PLAINTIFF IN ERROR

vs

UNITED FRUIT COMPANY . . DEFENDANT IN ERROR

BRIEF FOR THE DEFENDANT IN ERROR

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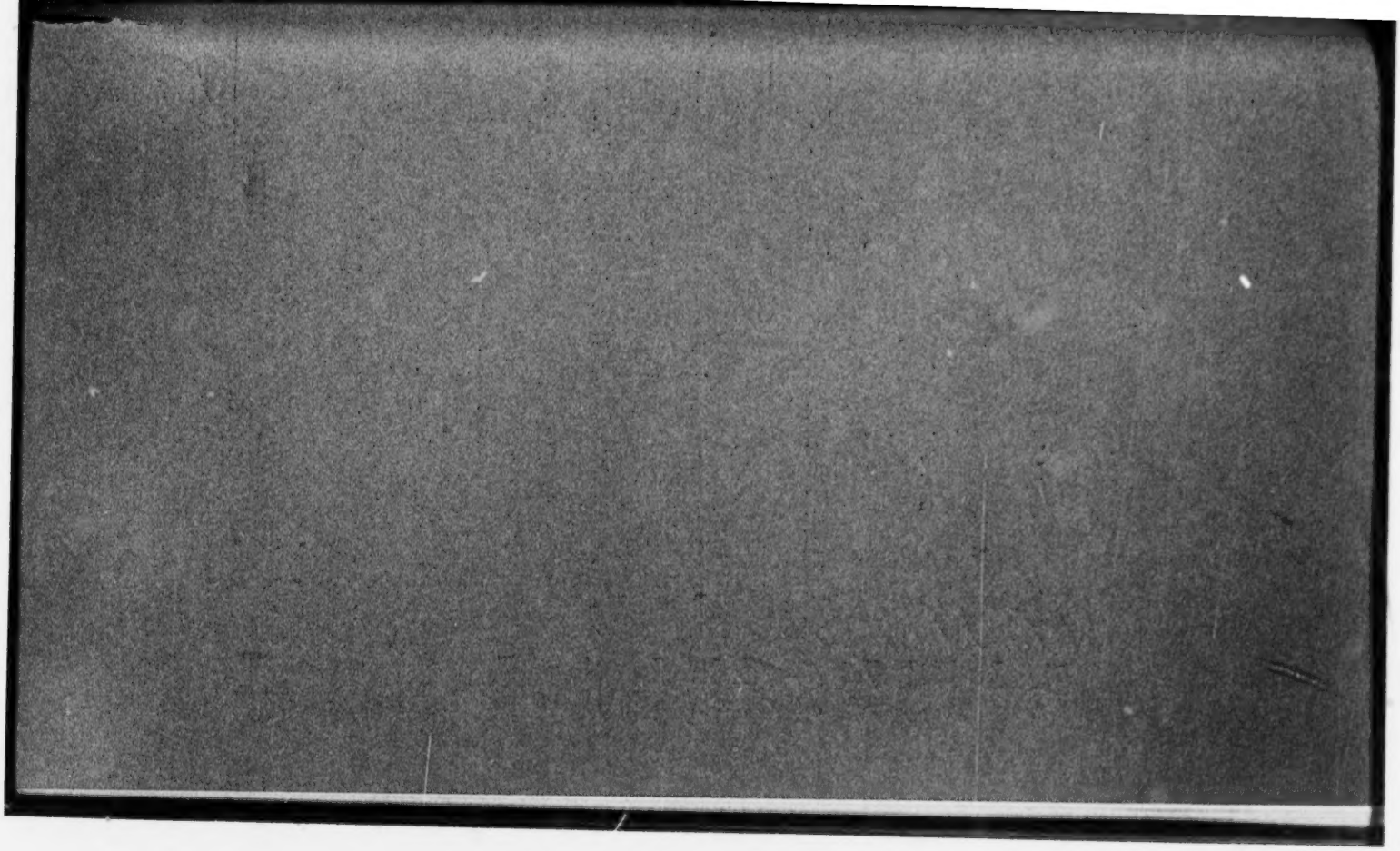

Supreme Court of the United States

OCTOBER TERM, 1908

No. 686

AMERICAN BANANA COMPANY . . Plaintiff in Error

v.

UNITED FRUIT COMPANY . . . . . Defendant in Error.

BRIEF FOR THE DEFENDANT IN ERROR.

This is an action at law to recover damages for injuries to the plaintiff's property and business.

The grounds on which these damages are claimed are stated in the 37th paragraph of the complaint (*Record, p.* 25), and are:—

that "through the acts and conduct" of the defendant the plaintiff has been "deprived of the use of" a certain plantation and "prevented from gathering and marketing the product" thereof and "has suffered great damages to its railway and the right of way thereof and the supplies sent to construct it and to its floating equipment and plantation because it has not been allowed to go on with its work and business"; and,

as an incidental grievance not seriously relied on in the plaintiff's brief, that the "plaintiff has been prevented from buying any bananas from other banana plantations because said banana market for export was wholly controlled by" the defendant, "and those contracting, combining or conspiring with it, and was thereby prevented from exporting the same and selling the same at its net

value in the United States separately and in combination with its own fruit and has thereby suffered additional damage."

A. The facts upon which the first claim rests are stated in the 21st, 23rd, 26th, 27th, and 31st paragraphs of the complaint (*Rec. pp.* 17, 19, 20, 22, 23).

The plaintiff alleges that it was organized under the laws of Alabama on or about June 18, 1904 (*Complt. par.* 1, *Rec. p.* 6); that in April, 1903, one McConnell "began to make a banana plantation and to plant bananas along the banks of the Sixola River in Panama and in the valley of said river in said Sixola district, as he lawfully might under the laws of the United States of Colombia, and to build a railway connecting said plantation with the nearest port, Gadocan" (*Complt. par.* 21, *Rec. p.* 17); that in the same month of April the Governor of the Department of Panama under the United States of Colombia "issued to one Romero a concession to build a railroad for the transportation of bananas from the river Sixola to Gadocan," and in May approved a transfer of this concession to McConnell (*Complt. par.* 23, *Rec. p.* 17): that the plaintiff purchased this plantation and concession from McConnell in June, 1904, and that the Governor who granted the concession had a year before advised "the National Government of the United States of Colombia" "that Costa Rica should be allowed to administer the territory through which said railroad was to run" (*Rec. pp.* 19, 18).

[*It will be observed that these are very vague descriptions of McConnell's property and rights, that there is no allegation of his title to any land and that the plaintiff purchased with knowledge, since McConnell became its president at its organization, Rec. p.* 19.]

The first acts complained of were done in July, 1904,

and the allegations in regard to them are that "Costa Rican soldiers and officials" seized the portion of the plaintiff's plantation lying on the north of the Sixola River "and a cargo of railroad and other supplies which had been landed from a vessel chartered" for the plaintiff (*Rec. p.* 19); that these soldiers and officials have held the goods and occupied the portion of the plantation ever since and have stopped the construction and operation of the plantation, railway and the piers which the plaintiff was building at the port of Gadocan and "have prevented the importation of supplies for said plantation and railway and the export of bananas therefrom," thereby preventing "the plaintiff from carrying on the trade of exporting bananas and other tropical fruits from said plantation and district to the United States of America" (*Rec. p.* 20); that the plaintiff has endeavored "to induce the government of the United States to interfere" and "the Government of Costa Rica to withdraw said soldiers and officials," but the defendant both before the Department of State of the United States and the government of Costa Rica has opposed and thwarted the plaintiff's efforts and urged the United States to refrain from interfering and urged the government of Costa Rica to continue the seizure and occupation, and "the said Government of Costa Rica has continued down to the commencement of this suit such forcible seizure and occupation" (*Rec.*, p. 23).

This clearly alleges that the acts complained of were the acts of the Costa Rican government, ratified and maintained by it, whether originally ordered or not, and it is immaterial which.

It is also clear that these acts were done in territory over which Costa Rica was *de facto* sovereign and in the exercise of its sovereign rights. The plaintiff claims that the acts were done in territory which became a part of Panama by the award made in 1900 of President Loubet under an

arbitration, *but it is not suggested* that the award has ever been carried into effect or that the territory was not in the possession of Costa Rica as the *de facto* sovereign, and this Court will take judicial notice of the fact, which has been recognized by the State Department of the United States, that the award has never been carried into effect and that Costa Rica with the consent of Panama, has retained the possession and administrative control of the territory, and exercises a present *de facto* sovereignty over it.

This appears from the action of the Department of State shown by the letter, of which a copy is attached to this brief, from Elihu Root, Secretary of State, to Charles E. Magoon, minister of the United States in Panama, which was laid before the Circuit Court at the hearing and properly considered by it and which is filed in this court.

> *Jones* v. *The United States*, 137 U. S. 202 p. 214.
> *Paquete Habana*, 175 U. S. at p. 696.

In this letter the Secretary states expressly:—

> "In the Department's conception of this matter, Costa Rica exercises at present a temporary *de facto* sovereignty over the territory included in the McConnell concession, subject of *right* to be divested at any time at the will of Panama, but actually continuing until such time as the pending boundary treaty is ratified.
>
> "In considering the present connection of Panama with the territory in question, it would appear that that State has consented that Costa Rica continue as the *de facto* sovereign until the ratification of the treaty. If Panama should interfere and seek to exercise at present jurisdiction north of the Sixola River, this would be inconsistent with her recognition of Costa Rica's temporary sovereignty in that district. In the view of the Department as long as the latter government is the sovereign in possession, whatever attributes that accompany or attend possession should be conceded to her, including the right to control by taxation or otherwise importations, etc., at Gadocan."

It is not alleged that the acts of the plaintiff were legal under the laws of Costa Rica, or that the government of that country was not proceeding strictly in accordance with those laws.

To connect the defendant with these acts, it is alleged that the soldiers and officials "were *instigated* and *induced*" by the defendant company to make the seizure, and were *induced* by it to hold the plantation and goods and to stop the operation of the plantation, railway and piers (*Complt. par.* 27, *Rec. pp.* 19, 20), and that the defendant has *opposed* and *thwarted* the efforts of the plaintiff before the United States Department of State and the Costa Rican government, and "has *urged* the United States to refrain from interfering in the premises and has *urged* the Government of Costa Rica to continue such forcible seizure and occupation," and "has *persuaded* certain officials of the Government of Costa Rica" to do so (*Complt. par.* 31, *Rec. p.* 23).

The defendant is connected with these acts of Costa Rica only as it is charged with *instigation, urgency,* and *persuasion* addressed to the governments and officials of the United States and Costa Rica. The word "induce" must mean the same thing when used to describe the acts of the plaintiff and the defendant. Thus in *par.* 31 (*Rec. p.* 22) the plaintiff says it "has been diligent to *induce* the Government of the United States to interfere on its behalf." Had it succeeded, the interference would have been the act of the government, not of the plaintiff.

It is not alleged that the defendant did any act or used any means to induce either government to act or abstain from acting, which would have been a cause of action if the course taken by the governments was a lawful one.

In paragraphs 28 and 29 of the complaint are found certain allegations which may be referred to, though they are not made the ground of any claim. The plaintiff alleges that in March, 1900 (*more than four years before the plaintiff was organized and three years before McConnell began his plantation*), one Jose Astua Aguilar began proceedings to acquire title to certain lands part of which are claimed by the defendant to be those occupied by the plaintiff; that in May, 1904 (*before the plaintiff was organized*), this Astua Aguilar made an attempt to continue these proceedings; that he obtained a judgment in a court of Costa Rica that the land claimed by the plaintiff belonged to him; that the title of Astua Aguilar was purchased by Keith and others as agents for the defendant and afterwards transferred to the Northern Railway Company of Costa Rica. It is alleged that the title thus acquired by Aguilar was void for various reasons which are set forth in the complaint, but it is not alleged that the defendant or any one else has taken possession of the lands in question or done any act in assertion of this title (*Rec. pp.* 20, 21, 22).

The plaintiff therefore has suffered no damage, and the questions raised as to the proceedings by which Aguilar obtained judgment are not questions which can be tried in the Courts of the United States.

B. The allegations on which the plaintiff rests its claim that it was prevented from buying bananas and exporting the same to the United States are found in paragraph 34 of the complaint (*Rec. pp.* 23, 24). These are that the defendant has conspired with certain persons "to destroy the market for the sale of bananas by growers to exporters, which existed formerly in the West Indies and Central and South America," "by driving purchasers out of the

market, outbidding them to such an extent as to make it impossible for them to buy at a profit and persuading them to join or sell out to said combination"; that this combination has "regulated the prices at which bananas could be bought," has purchased some plantations, has made contracts for the sale of bananas covering long periods with the owners of other plantations, and such contracts were in force at all times named in the complaint, and, as a result, "there was no market in which bananas were for sale for export in sufficient quantities to enable the plaintiff to buy them and ship them by steamer to the United States," and it was prevented from doing so, which it would otherwise have done to its great profit.

The acts complained of were all done in the West Indies, or in Central or South America, and they were outbidding other purchasers, purchasing plantations and making contracts for long periods for the purchase of bananas from growers with the result that there were not sufficient bananas in the market for the defendant to buy. As stated by the Circuit Court of Appeals (*Rec. p.* 107), "it is not alleged that the plaintiff had made any preparations to engage in the business of buying bananas independent of the operation of its own plantation, nor that it desired or intended to engage therein as a separate and independent business. It is not averred that the plaintiff invested any money in preparing to engage in any such independent business; nor does the extent to which, nor even the country in which it desired or intended to engage therein appear," nor is it averred that it made any effort to buy any bananas anywhere. It was not even organized to buy or grow bananas in the West Indies or South America. (*Compl't. par.* 1. *Rec.* 6.)

These are the grounds on which the plaintiff claims damages of the defendant.

C. The plaintiff claims that its damages should be multiplied by three under the Sherman Act, and its allegations in support of this claim are as follows:—

The complaint alleges that the defendant, the United Fruit Co., incorporated 30th March, 1899, was engaged in the business of importing bananas into the United States from the West Indies and Central and South America in competition with various persons and corporations (*par.* 3, *Rec. p.* 7), that by reason of this competition the importers were obliged to pay "fair and reasonable prices" to the growers of bananas (*par.* 6, *Rec.* 8), and that for the purpose of controlling and monopolizing the business and regulating prices and preventing competition, the defendant in the years 1899 and 1900 and subsequent years, purchased the property and business of several competing individuals and companies, exacting a condition that the sellers should not further engage in the trade unless the seller became an officer of or otherwise identified with the defendant (*par.* 7, *Rec.* 8).

That in 1899 and subsequent years the defendant entered into contracts with many other persons and corporations engaged in the business for regulating the quantities of bananas to be purchased and sold by each, and the price at which they were to be purchased, and the manner of selling, so as to prevent competition between them and the defendant, and they thereby prevented such competition and restrained and monopolized the trade (*par.* 9, *Rec.* 9).

[*It is not alleged that any of these contracts have been in force since the plaintiff came into existence, or how long any of them continued.*]

That, for the purpose of so regulating the sale of such fruit and monopolizing the trade and further carrying out these contracts, the defendant caused the Fruit Dispatch Company to be incorporated, of which the defendant held all the shares, and it was then agreed by the defendant and

the others so combining that all the bananas imported by them should be sold at fixed prices through this Fruit Dispatch Company (*par.* 11, *Rec.* 10).

[*It is not alleged how long or when this agreement was in force.*]

That there also exist some contracts between the defendant and some other persons and companies of the same general nature to accomplish the same purpose, but the full terms are not known to the plaintiff; that the Northern Railway Co. of Costa Rica, whose principal business is the carrying of bananas, is owned and controlled by the defendant; and that the companies previously mentioned constitute the great majority of the important companies importing bananas into the United States (*par.* 12, *Rec.* 10, 11).

That, after these contracts had been made and in pursuance of them, the defendant and the others so contracting with it entered upon a destructive competition with Camors, McConnell & Co., who were then engaged in the same business, as they were also doing with such other independent importers as had not combined with the defendant, so that Camors, McConnell & Co. conducted their business at a loss. The defendant then proposed to Camors, McConnell & Co. to make their business part of the combination by incorporating the Camors-McConnell Co., a majority of the stock of which should be held by the defendant (*par.* 13, *Rec.* 11). And accordingly two contracts were entered into about the 8th December, 1899, by one of which, made between the several individuals interested, one-half of the shares of the Camors-McConnell Co. were transferred to an officer of the defendant company in trust for its benefit, and the same officer also received one additional share in trust in the same way, so that he should control the majority and have power to elect three of the five directors (*par.* 14, *Rec.* 12). The

other contract was made between the shareholders of the Camors-McConnell Co. for ten years, and limited the amount of fruit which that company could import and restricted the importations of fruit by the defendant and regulated the prices (*par.* 15, *Rec.* 13). Another contract was drawn up at the same time and executed about the 27th January, 1900, after the formation of the new company, by which the Fruit Dispatch Co. was appointed exclusive selling agent of the Camors-McConnell Co., as it has been ever since, with the purpose of giving the defendant control of sales (*par.* 16, *Rec.* 13). And the defendant and the Camors-McConnell Co. have since conducted the business under the said contracts in association with the other persons and corporations previously mentioned who had entered into similar contracts (*par.* 17, *Rec.* 14). These contracts enabled the defendant to maintain excessive prices for bananas and to restrict the amount imported (*par.* 18, *Rec.* 15, 16).

By amendment, paragraph 17*a* (*Rec.* 14), that the defendant from time to time acquired a controlling interest in the stock of several specified corporations, which had before been competing with the defendant in the business of importing bananas, and that this was done as part of a combination and conspiracy to monopolize "a part of the trade."

That in the spring of 1904 the defendant, in order to monopolize the trade in such fruit, induced the officials of the Republic of Panama, in violation of the statute of the United States, to sign a contract of concession granting to the defendant exclusive shipping privileges in the Changuinola and Sixola districts in Panama, which are favorable to the cultivation of bananas (*par.* 19, *Rec.* 16).

That the defendant, in combination with others as aforesaid, during five years last past has carried on an economic warfare against every other company engaged in the same

business and against the plaintiff since its organization underselling them at competing points (*par.* 20, *Rec.* 16, 17).

That the defendant has sought to injure the plaintiff's business by offering positions to its employees and by discharging and threatening to discharge from its employ any persons who were stockholders of the plaintiff (*par.* 33, *p.* 23).

[*It is not alleged that any of the offers of positions were accepted, or that any facts existed making the offers or the threats unlawful, or that any damage was sustained by the plaintiff by reason of any of them.*]

That the aforesaid contracts, combinations, and conspiracies were entered into by the defendant for the purpose of restraining trade and commerce with foreign nations and among the several states (*par.* 35, *Rec.* 24), and the defendant in the said manner and form has monopolized and combined with others to monopolize part of the trade and commerce among the several states and with foreign nations, and the plaintiff has been injured thereby in its business and property (*par.* 36, *Rec.* 24, 25).*

DEFENDANT'S POINTS.

I. The plaintiff cannot recover for any injury caused to its property or business by the acts of the Government of Costa Rica.

II. There is no case stated under the Sherman Act:

1. Because the plaintiff does not allege that the plaintiff was "injured in its business or property by anything forbidden or declared to be unlawful" by the Sherman Act;

2. Because the complaint does not allege any combination forbidden by the Sherman Act.

*NOTE.—The question was raised by motion to dismiss the complaint under the New York practice. *Tooker* v. *Armoux*, 76 N. Y. 397, at p. 400.

III. The plaintiff cannot recover any damage caused by the acts which are alleged to have prevented it from buying bananas.

IV. The damages claimed for loss of profits on sales of bananas, whether to be grown on the plantation claimed by the plaintiff or to be purchased, are too remote and speculative to be recovered.

V. The plaintiff cannot recover on the ground that the defendant was a party to a conspiracy.

VI. If the plaintiff has no cause of action under the Sherman Act, the case is one in which the jurisdiction of the Circuit Court rests on diverse citizenship and no appeal lies to this Court from the Circuit Court of Appeals.

I.

The plaintiff cannot recover for any injury caused to its property or business by the acts of Costa Rica.

a. The allegations of the complaint make it clear that the plantation railroad and goods of the plaintiff were seized by the officers and soldiers of Costa Rica, and that their action in making this seizure has been approved and possession of the seized property has since been retained by the government of that state acting in the exercise of its *de facto* sovereignty over the territory in which the seizure was made.

The acts complained of were the acts of Costa Rica, and the damage claimed was caused by those acts. Whether they were originally ordered or only approved and ratified is immaterial.

Buron v. *Denman*, 2 Exch. 167.

The general principle is stated by Mr. Chief Justice Fuller in delivering the opinion of this Court,—

"Every sovereign State is bound to respect the independence of every other sovereign State and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

Underhill v. *Hernandez,* 168 U. S. 250, 252.

Sir Frederick Pollock in his work on Torts states the rule in these words:—

"If we may generalize from the doctrine of our own courts, the result seems to be that an act done by the authority, previous or subsequent, of the government of a sovereign state in the exercise of *de facto* sovereignty is not examinable at all in the courts of justice of any other state."

Webb's Pollock on Torts, pp. 132, 137.

The status and territorial jurisdiction of foreign states, their rights, powers, and obligations, the rights and obligations of a citizen of the United States arising out of relations with a foreign government, and, conversely, the rights and obligations of a foreign state in dealing with a citizen of the United States, are necessarily political questions, which, under the constitution of this government, are confided exclusively to the executive branch of the government, and with them the judicial branch has no concern.

Kennett v. *Chambers,* 14 How. 38, 51.
Williams v. *Suffolk Insurance Co.,* 13 Peters, 415.
United States v. *Holliday,* 3 Wall, p. 419.

The reason and wisdom of this rule is shown in the decision of the United States Circuit Court of Appeals in *Underhill* v. *Hernandez,* 65 Fed. Rep. 577. In his opinion Judge Wallace says, at page 579:—

"Considerations of comity and of the highest expediency require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign

citizens, should not be called in question by the legal tribunals of any other jurisdiction. The citizens of a state have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs even by a resort, if necessary, to the arbitrament of war. *It would be not only offensive and unnecessary but it would imperil the amicable relations between governments and vex the peace of nations to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states.*"

The authorities are clear.

Duke of Brunswick v. *King of Hanover*, 2 H. L. C. 1 (same case below, 6 Beavan, 1; 13 L. J. Ch. 107).

Secretary of State v. *Kamachee*, 13 Moore Privy Council, 22 (same case, English Reports Reprint, Vol. 15, p. 9).

Buron v. *Denman*, 2 Ex. 167 (1848).

Feather v. *Queen* (1865), 6 B. & S. 257.

Doss v. *Secretary of State*, 19 Equity, 509.

b. In this case the *de facto* sovereignty of Costa Rica is recognized by the State Department, and this recognition establishes the fact conclusively in the Courts of the United States.

It is immaterial, however, whether Costa Rica had jurisdiction and sovereignty over this territory in dispute, or whether its attempt to exercise such jurisdiction was by legal right or was an act of war or aggression against the Republic of Panama.

Underhill v. *Hernandez*, 168 U. S. at p. 252.

The acts complained of were acts of state, and, even if they had been done on territory in the possession of Panama,

they could not be made the ground of an action in the Courts of this country against any one concerned in them, as is shown by *McLeod's Case* referred to in *Underhill* v. *Hernandez*, 65 Fed. R. p. 581, as well as by *Buron* v. *Denman*, 2 Ex. 167. If wrongful, they were international delinquencies for which the government of Costa Rica was responsible to the *nation*, but not to a *citizen* of the nation.

Redress for injuries caused to a citizen of a foreign nation by another nation through the exercise of *de facto* powers, even though maintained by means of force alone, cannot be had in the ordinary municipal courts of another nation, nor even in the courts of the offending nation without its consent. It can only be had in the forum of international relations.

c. But the plaintiff claims that, if the defendant instigated and induced the government of Costa Rica to do the acts which injured the plaintiff's property, the defendant may be liable for the consequences of these acts.

In considering this claim, it is to be observed that

1. The government of Costa Rica claims that its action was proper and has maintained it. The matter has been brought to the attention of the United States government, and it has refused to interfere. These facts are clear on the allegations of the complaint, (*Rec. pp.* 22, 23) and the official record of the State Department of which this Court takes judicial notice.

2. The plaintiff nowhere alleges that its action either in making its plantation or building its railway or landing its goods was justified by the laws of Costa Rica or that the officers of Costa Rica were not proceeding in strict conformity with those laws. The plaintiff may have entered illegally on public land and have undertaken to

import its goods in violation of Costa Rican customs laws, but, whether it violated the laws in one way or another, Costa Rica claims that the acts of its officers were entirely legal and the plaintiff does not deny this claim (*Plaintiff's Brief, pp.* 39, 41).

If the acts were legal, no one can be liable for the consequences resulting to the plaintiff from its violation of Costa Rican law. It has suffered no wrong. Under no government is the person who sets the law in motion against a wrong-doer liable to the guilty person. For example, if an importer in New York learns that a competitor has smuggled goods and informs the authorities, with the result that the competitor's stock is seized and his business injured, the informer is not liable, even though he may have desired to injure his rival.

There is no such relation between a government and an individual that the latter can be held responsible for the acts of the former.

3. It is not suggested that the defendant made any fraudulent representation or used any other wrongful means to induce the Costa Rican government to do what it did. It is only alleged that the defendant *instigated* and *induced* and *urged* and *persuaded*. This involves only laying before the government a statement of the doings of the plaintiff and McConnell, about which there was no doubt, and urging the government to enforce the laws of Costa Rica which they were violating. It was not a wrongful act on the part of the defendant to lay the facts before the government and urge it to act. The defendant even had an interest in applying to the government by reason of its interest in the title originally acquired by Astua Aguilar under the laws of Costa Rica. The defendant was no more liable for the acts of the Costa Rica government by reason of having urged it to act, than it was for the refusal of the United States government to interfere by

reason of having opposed the efforts of the plaintiff to induce the State department to interfere.

A comparison of this case with such cases as *Angle* v. *Chicago, St. Paul & Omaha Ry. Co.*, 151 U. S. 24, shows the entire absence in the present case of all grounds upon which the defendant might have been liable if it had done any wrongful act itself by which the Costa Rican government had been led to do what caused damage to the plaintiff.

4. The defendant cannot be made liable except on the ground that the acts of the Government of Costa Rica were wrongful and that the defendant is responsible for them.

If it were possible to hold the defendant liable for acts of the Costa Rican government, it is clear that the first step must be to satisfy the Court that the acts were illegal, and this would involve trying in the Courts of this country the question whether the acts of a foreign independent state were legal under its laws or not. This is a question upon which under the authorities the Courts of this country will not "sit in judgment."

Even within the jurisdiction of a state a man who instigates a prosecution falsely and maliciously is not liable to the injured party until the prosecution is ended in his favor; that is, until the question between the state and the accused person has been tried out.

The suggestion that the defendant and the government of Costa Rica are to be treated as joint tort-feasors emphasizes this point. There can be no joint tort-feasance unless there is a tort. If the person who does the act is strictly within his legal rights, no tort is committed. To establish liability on this ground is to ask the Courts of the United States to try the question whether Costa Rica's acts were tortious, and this under the authorities the Courts will not do. Such an inquiry would be equally offensive and

objectionable, whether Costa Rica were a party to the controversy or not. That government is entitled to immunity from investigation of its sovereign acts in a court of this country, even collaterally.

Underhill v. *Hernandez*, 65 Fed. R. 577; 168 U. S. 250.

It is the character of the act brought in question which halts a court when matters of state, political in nature, affecting the conduct of foreign nations, are drawn in question. Thus in *Nabob of Arcot* v. *East India Co.*, 4 Brown Ch. 180, the answer to a bill of equity alleged that all of the transactions mentioned in the bill were of a political nature and matters of state, and the Court dismissed the bill on that ground alone. And in *Duke of Brunswick* v. *King of Hanover*, 6 Beavan, 1, the Master of the Rolls concluded an elaborate discussion of the defendant's liability to a suit in chancery with the opinion that the King of Hanover, although a British subject, could not be sued in the Courts of England for acts done by him *as King of Hanover*. The dismissal of the bill was not based upon the personal immunity of the defendant as a foreign sovereign, but upon the ground that the act complained of was an act of state, and that no court of England could sit in judgment upon the act of a sovereign done by virtue of sovereign authority abroad.

Our Constitution confided such questions to the executive department, and for the judiciary to pass upon them in any form might prove very embarrassing in our dealings with foreign governments. For if the State Department should make a claim against Costa Rica in behalf of the plaintiff for damages based upon the ground that Costa Rica had no jurisdiction over the territory where it attempted to exercise its sovereignty, and during the pendency of such negotiations or after they had

resulted in a finding that Costa Rica did *not* have such jurisdiction it should be decided by this Court that Costa Rica *did* have such jurisdiction, it is obvious that such a conflict between co-ordinate branches of the government would result in embarrassment and in a loss of its dignity and prestige. As was said by the Supreme Court in the case of *Williams* v. *Suffolk Insurance Co.*, 13 Peters, 420:—

> "If this were not the rule, cases might often arise in which on the most important questions of foreign jurisdiction there would be an irreconcilable difference between the executive and judicial departments. By one of these departments a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise and so destructive of national character."

If the plaintiff has suffered any wrongs at the hands of the Costa Rican authorities which they will not redress, its proper course is to ask the executive department of this government to interpose its influence (*Underhill* v. *Hernandez*, 65 Fed. Rep. 579). It appears from the complaint that the plaintiff adopted this course (*par.* 31, *Rec.* 22, 23), but has been unable to induce the government of this country to interfere in its behalf. The failure of that department to exert itself in the plaintiff's behalf does not give it a right to resort to the courts. On the contrary, the refusal of the executive department to intervene in behalf of the plaintiff is an evidence of the determination, by the department charged by the Constitution with the decision of such questions, that the acts of Costa Rica were entirely within its jurisdiction and its rights.

5. The plaintiff has attempted to distinguish the present case from those above referred to on the ground that they apply only where a suit is brought *directly* against a foreign

government or "*an officer acting within its territory* under its commands," and that they do not hold "that the courts of this country can never consider and collaterally pass upon the legality of acts of a foreign nation."

We may say at once that the cases contain no such limitation as to territory, nor is there any such limitation of the doctrine.

The plaintiff asks this Court to hold that,while the Costa Rican officers and men who acted under the authority of the government in entering upon and holding possession of the plantation might not be liable to an action, any person who gave the information which induced the government to act, or who urged the government to continue in possession, is liable for the acts of the government if the Court decides that the territory, although in the possession of Costa Rica, rightfully belonged to Panama.

This would make any officer under the Costa Rican government, or any citizen of that country as well as the defendant, liable for the acts of the government, if he gave information as to what the plaintiff was doing, or urged the government to exercise what he believed to be its rights. The result would be that an officer who did the acts would not be liable, but one who gave the information or persuaded the government to order or adopt them would be liable. Any such rule as that would make the president of the country or the ministers who commanded the seizure or continuance of the possession liable in an action for damages, and would necessarily impair the efficient exercise of the sovereign power by inducing servants of the State and other persons to withhold information and assistance which they ought to give and which it is entirely proper that the State should receive and act upon.

Such a doctrine would seriously hamper the independent exercise of governmental functions by sovereign nations and lead to serious diplomatic complications.

It is needless to say that the plaintiff's counsel refer to no authority for such a contention. No distinction can be made between such other persons and the defendant as regards the right or propriety of giving information or of persuading or urging the government to do what they believe it has a right to do. By giving information or advice the informer does not create the relation of master and servant, or of principal and agent, between himself and the government, nor does he become liable as master or principal in the transaction for whatever the government may do. The government acts on its own responsibility upon the information or application laid before it, and the persons who bring the matter to the attention of the government are not liable unless they have done some wrong independently of what the government does.

The plaintiff's counsel, in their brief (p. 20), refer to *Rafael* v. *Verelst*, 2 W. Bl. 1055, as a case decisive in favor of the plaintiff. But, if the case is examined, it will be seen to be quite otherwise. It was found by a special verdict that the Nabob Sujah al Dowlah, under whose orders the plaintiff was seized and imprisoned, "was constitutionally independent of the East India Company, but, in ordering the said arrest and imprisonment, was under the *awe* and *influence* of the defendant, and acted *contrary to his own inclination, being fearful of offending him.*" The head-note of the case is sufficient to show that it has no application to the present case, where it is not pretended that any of these circumstances existed. DeGrey, C. J., said: "But I consid the Nabob as not being the actor in this case, but the act to be done, in point of law, by those who procured or commanded it, and in them it may doubtless be a trespass. Sujah Dowlah was a mere instrument. He acted not from any motives of his own, but *gave way through awe and fear.* If, in the doing of an act, there be

several intervening agents, and one happens not to be amenable, will it be said that all the rest are excused?" Blackstone, J., said: "The Nabob acted '*contrary to his own inclination,*' through *fear of offending* the defendant, and under his *awe* and *influence.* After such a finding, there is no room for argument. The Nabob is a mere machine—an instrument and engine of the defendant."

It is to be inferred from the reasons thus given for this decision that the defendant would not have been liable if the Nabob had been a free agent acting as he thought proper upon the information and reasons given by the defendant.

McLeod's Case, referred to in the plaintiff's brief (p. 15), is sufficiently disposed of by the judgment of this Court in *Underhill* v. *Hernandez,* 65 Fed. R. 581. The case derives no authority on this point from its being cited upon another point in *Barrington* v. *Missouri,* 205 U. S. 487. If the decision was right, it would be inapplicable here. McLeod was indicted in New York for killing a man in that State. He defended on the ground that he was acting under the orders of the Canadian Government and it was held that this authority did not protect him outside of Canada. In this case the acts were done by the Government of Costa Rica within its own territory.

The cases of *U. S.* v. *Lee,* 106 U. S. 196, *Mitchell* v. *Harmony,* 13 How. 115, and *Baird* v. *Walker* [1892], A. C. 491, were cases between individuals and officers of the government to which they were subject, and did not involve any question of acts done under the authority of a foreign state. Upon this point it is enough to quote from Pollock on Torts (1st ed.), 96, where, after setting out the rule that the municipal courts do not entertain actions by individuals against persons concerned in acts of state done

under the authority of or subsequently ratified by the government of a foreign state, he proceeds as follows:—

> "So far Mr. Justice STEPHEN, in his History of the Criminal Law (Vol. ii., p. 64). It is only necessary to add, as he does on the next page, that 'as between the sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not,' as, for example, when the Court of King's Bench decided that a Secretary of State had no power to issue general warrants to search for and seize papers and the like."

The Marianna Flora was a case where the question which the Court considered was expressly delegated to the judicial department of the government by an Act of Congress, and did not involve the question whether Congress had power to bring such a matter within the judicial power of the Courts.

The Merino. The language quoted from this case was not used with reference to the principle now contended for. That principle was not involved in the case at all.

La Jeune Eugenie. The subject-matter involved in this case was not of the kind which is usually regarded as a matter of state, but rather such as is cognizable in courts of law. One question was merely whether the Court would take evidence other than that contained in the ship's documents in order to determine judicially whether it was a French ship or an American ship. The ship was a slaver and the French Consul filed a claim in behalf of French owners. The decree was that the ship be delivered to the French government.

Vasse v. *Ball.* This case is not applicable. The Court

merely made a presumption as to what the decision of an English Court was in regard to the nationality of a vessel. The decree of the English Court was not specific upon the subject. If it had been, the Court expressed doubt as to what they would have decided, one judge saying that he would strongly incline to think they were bound by the decree.

The *Santissima Trinidad* is not applicable. The question arose in a proceeding *in rem*. The Court held that as it had first seized the vessel, its jurisdiction was exclusive of any foreign Court.

These and other like cases cited in the plaintiff's brief come within the statement of the Court in *Underhill* v. *Hernandez*, 168 U. S. p. 254:—

> "Cases respecting arrests by military authority in the absence of the prevalence of war; or the validity of contracts between individuals entered into in aid of insurrection; or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy, and the like, do not involve the questions presented here."

6. As it seems to us, the plaintiff's counsel has improperly appended to his motion to advance this case an affidavit which sets forth certain statements alleged to have been extracted from a report said to have been made in 1906 by a person, whose name is not given, in a German consulate to the German government. The apparent purpose, as is shown by the passage italicized in the affidavit, is to create the impression that the government of Costa Rica is controlled by the defendant and so to affect the judgment of the Court. With the same intent the suggestion is made in the plaintiff's brief (*p.* 45) that "an American citizen ought not to be allowed to induce a weak and corrupt government," etc.

It is to be observed in reference to this:—

a. That no such allegation is made in the complaint. It is not suggested that the Government of Costa Rica was weak or corrupt or that the defendant controlled it or influenced it by any improper means. There is really no difference in the allegations concerning the influence exerted on the government of Costa Rica and that exerted on the government of the United States. The averment that the defendant "urged" the United States government not to interfere, and has "thwarted" the efforts of the plaintiff to induce the United States to interfere, implies as much influence, as the averment that it has "urged" and "persuaded" the government of Costa Rica (*Rec. p.* 23).

b. That the statement of the unknown person is not evidence of anything and could not be evidence against this defendant in any Court.

c. That the defendant has no opportunity in this Court for showing how far from true these statements are and what the facts really are.

We can only deny the truth of these statements, and ask the Court to recognize that they have no place in this record.

d. It should be added, however, that the attempt to influence this Court in this way involves very dangerous results. The suggestion seems to be that this Court may inquire as to the strength or weakness of independent states and the motives which induce or influence their action.

It is submitted that before this Court there are no weak states, and that there is only one law for all, which applies alike to Great Britain and to Cuba. It would be at once impossible and indecent for any court of justice to classify the different independent nations, to have one law for Rome

and another for Athens, to decide in which class a given state shall fall, or to sit in judgment upon the motives which actuated either the Czar of Russia, the Sultan of Turkey, or the President of Costa Rica in any action. Accusations that governments are improperly influenced are common everywhere, and in our own country during every political campaign the suggestion that great corporations control the Administration and Congress are continually made by pen and pencil, but such accusations against one government cannot be tried in the courts of another.

In this connection it may be well also to say that if, as in the Court below, the plaintiff in error founds any argument on allegations made in amendments contained in Exhibit B (*Rec. pp.* 66 *to* 70), it should be pointed out that

(1) These amendments were denied by the Court (*Rec. p.* 63), and this denial was not appealed from or assigned as error. The averments of these amendments are not therefore part of the plaintiff's case, and no inference can be drawn from them.

(2) But, even if they were a part of the record, they would not help the plaintiff. The allegations really contain new matter, and the argument upon them is that the defendant is liable for the acts of the Costa Rica government upon a new ground. That ground is that two years after the government took possession of the plantation the defendant, in order to obtain the approval of a decree of court in proceedings for denouncement of the land according to the law of Costa Rica, gave a bond of indemnity taking upon itself the pecuniary responsibility for sums that might be collected from the government upon the claim of the plaintiff in respect of the lands or the occupation thereof and of the railway, and the plaintiff's property, business, and other rights there (*Rec. p.* 68).

It is claimed that this indemnity was an adoption of the

action of the government and made it the act of the defendant.

No authority is cited for such a proposition. The authorities referred to only show that the act of an agent beyond his authority may be ratified, and, in the case of an officer serving a writ, the giving of a bond of indemnity may be some evidence of a ratification.

But the government of Costa Rica never assumed to act as an agent of the defendant or on his behalf. And, unless the government professed to be acting on behalf of the defendant, there was nothing to ratify (*Keighley, Maxsted & Co.* v. *Durant* (1901), A. C. 240, 247).

Keller v. *Ashford*, 133 U. S. p. 622, shows that an agreement to indemnify does not create any direct liability to the person having the claim, and that he can only enforce the indemnity in exceptional cases, and then only in equity.

But, as the amendments were not allowed, the questions argued by the plaintiff's counsel do not arise on the record.

II.

The plaintiff cannot recover damages under the Sherman Act.

A. Because the complaint does not show that the plaintiff was "injured in its business or property by anything forbidden or declared to be unlawful by the Sherman Act."

(1) The plaintiff in the Court below stated in the first point of his brief,—

> "The cause of action is not created by the Sherman Act."

This concession is now withdrawn, but the proposition conceded is clear. The Sherman Act only forbids combinations in restraint of, or monopolizing or attempting

to monopolize, any part of "the trade or commerce among the several states or with foreign nations." It gives a civil remedy to persons injured by such combinations or monopolies, which did not before exist, but that remedy is only given for what the act forbids, not for doings and omissions not forbidden by the act, which were already actionable,—not for ordinary acts and trespasses,—and least of all for acts done in the course of that business competition which it was the purpose of the act to encourage.

The argument of the plaintiff is that, where a combination to restrain trade exists, the object of which is to increase the business or profits of the parties, every act done by any party to injure a competitor is an act of the combination, because its purpose is to help the business of the combination.

There is in this argument a clear fallacy. A man may make a combination contrary to the Sherman Act by entering into an agreement with others regulating the quantities of goods to be sold and the prices. But a trespass or other actionable tort committed by one of the parties for the purpose of injuring a rival is not a consequence or an act done in pursuance of the agreement.

We may suppose a case by way of illustration. A has two competitors in business, B and C. To stifle this competition, he makes a contract with B which limits production or in other ways restrains trade. He then turns on C and burns down his property, slanders his goods, infringes his trade-mark, or does any other tortious act to drive him out of business. A's motive in both cases is the same, but it cannot be said that his acts against C result from his agreement with B to limit production. Were this not so, B might become responsible for A's crimes, which he never thought of, on the theory that they were the natural results of his agreement with A.

In the case at bar the acts complained of are trespass on the plaintiff's real estate, the seizure of his goods and the detention of both. These acts, if unauthorized by law, were all torts which have always been actionable at common law. There is no necessary or natural connection between them and the agreements and combinations set out in the complaint. They were simply trespasses upon the property of the plaintiff. The servant of a forbidden combination, who is injured in the course of his employment by some negligence for which the employer is liable, cannot claim treble damages by proving the existence of the combination, and that his injury was sustained in carrying on the business.

(2) The Sherman Act does not give a right to threefold damages for everything that is done by any one who is a party to a contract or combination in restraint of trade. The right is given only to a person injured in his business or property "by reason of anything forbidden or declared to be unlawful by this act." It is not enough to show that there was such a contract or combination and that the plaintiff was injured in his business or property by something done by one of the parties thereto. It is necessary in addition to show that the injury was the *direct* result.

Rice v. *Standard Oil Co.*, 134 Fed. R. 464–465.

In *Connolly* v. *Union Sewer Pipe Co.* (184 U. S. 540, 552) the plaintiff sued for the purchase price of certain pipe and the defendant defended on the ground that the pipe was sold pursuant to a combination which was in violation of the Sherman Act, and it also sought to recover by way of set-off treble damages under Section 7 of that act. The Court said that "damages claimed cannot be set off in these actions based *upon special contracts for the*

sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies. Such damages cannot be said, as matter of law, to have *directly grown out of that arrangement or combination.*" . . .

The seizure of the plaintiff's plantation and property by the Costa Rican government was not a thing forbidden or declared to be unlawful by the act.

It was not the natural result of either

(*a*) the alleged purchases of the business of competitors for the purpose of monopolizing trade (*Compl*t. *par.* 7), or

(*b*) the alleged agreements by the sellers not to compete (*Compl*t. *par.* 8), or

(*c*) the alleged agreements with competitors regulating the quantity of bananas to be purchased and sold by each and the prices at which the fruit was to be so purchased and sold (*Compl*t. *par.* 9, 11, 12), or

(*d*) the alleged agreement by which the defendant obtained a majority of the shares of the Camors-McConnell Co. and thereby the power to elect three out of the five directors (*Compl*t. *par.* 14), or

(*e*) the alleged agreement restricting the importations of fruit by the Camors-McConnell Co. or by the defendant (*Compl*t. *par.* 15), or

(*f*) the alleged contract appointing the Fruit Dispatch Co. the exclusive selling agent of the Camors-McConnell Co. (*Compl*t. *par.* 16).

The seizure was not made in pursuance of any of those contracts. If it had been the natural result of any of them, the plaintiff would have had as good a right to proceed against the other parties to the contract for the damages caused by the acts of the defendant as against the defendant itself.

It would be a natural result of such contracts that

the plaintiff, if it bought bananas in this country, might have to pay a higher price for them, as in *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, and *Montague* v. *Lowry*, 193 U. S. 38. But the seizure of the plaintiff's property, or the inducing of such a seizure, did not result from them.

The combination might directly affect consumers and dealers in the United States by raising prices. It might affect growers in the West Indies by lowering prices. Neither result was injurious to a competitor in the same business whose interest it would be to buy cheap and sell dear. But it was competition, not combination, of which the plaintiff complains.

The seizure of the property, if the defendant was answerable for it, might be described as a trespass, or some other actionable wrong, but there is no known use of language by which it could be described as a restraint of trade or monopolizing trade, however much it might injure the plaintiff's business.

(3) The acts are alleged to have been done entirely in a foreign country, with which the Sherman Act has nothing to do. It is only acts made criminal for which the defendant could be indicted that are the basis of an action under the 7th section of the Sherman Act.

The alleged acts of the defendant in inducing the Costa Rican government to seize the plaintiff's plantation and forcibly to prevent the building of the railroad from the plantations to the Port of Gadocan had neither directly nor indirectly any necessary or immediate relation to commerce between Panama and the United States. They were acts committed in Costa Rica. Their tortious character does not alter the fact that their direct effect was on *production* and not on *trade*. The direct effect of the defendant's acts was to injure production only.

The only way in which the plaintiff attempts to connect the injury to its plantations with trade is by alleging that it *intended* to make the product of its plantations the subject of some kind of trade. This is an altogether insufficient basis for a claim under the Sherman Act.

Suppose the corporation known familiarly as the "Sugar Trust" were in Pennsylvania to close by force one of the refineries belonging to such a combination for manufacturing sugar as was dealt with in the case of *United States* v. *E. C. Knight Co.* Having held that the manufacture of sugar was not interstate commerce, could the court hold that tortious interference with that manufacture within the limits of a state was interference with interstate commerce? Obviously not.

The acts complained of therefore committed in the territory of a foreign state and interfering only with the production of goods, which like the sugar in the E. C. Knight Co. case might be used in interstate commerce, were not actionable under the Sherman Act.

(4) The acts complained of are in part trespasses on real estate. If damages are claimed on that ground, the answer is that, as the land is in a foreign country, the Courts of this country have no jurisdiction of an action for the trespass.

Ellenwood v. *Marietta Chair Co.*, 158 U. S. 105.
Cragin v. *Lovell*, 88 N. Y. 258, 262.
Allin v. *Connecticut River Lumber Co.*, 150 Mass., 560.
British South Africa Co. v. *Companhia de Mocambique* (1893), A. C. 602.

(5) Still, again, the plaintiff was not engaged in commerce either interstate or foreign, and therefore cannot recover under the Sherman Act for what was done in the territory of Costa Rica.

No one can come into Court and claim damages under

this act by proving that the existence of an illegal combination prevented his engaging in business.

The plaintiff had never actually engaged in trade, and for all that appears from the complaint never would have so engaged. All that it ever did with its bananas and all that Costa Rica's acts ever affected was "the preparation for their transportation from the State where produced or manufactured," and that is not trade or commerce (*In re* Greene, 52 Fed. Rep. 104). The seizure of the plantation could have had an effect on the foreign commerce of the United States only in the event that such bananas were exported to the United States. But the direct and necessary effect of these acts was not restraint of the foreign commerce of the United States. The acts only, and neither the intention which induced their commission nor the intentions of the persons injured by the acts, must be examined to determine their character.

Whether the plaintiff would have engaged in such commerce would depend entirely upon what it did after it had raised, cultivated, and gathered its bananas and after it had built its railroad to Gadocan. The bananas raised might be disposed of wholly within Panama, or, if sent to Gadocan, might be thence transported for sale to other ports in Panama or Central or South America or Europe. Even though it did intend to engage in commerce with the United States, after doing the foregoing things, it might subsequently alter its intention and carry on its trade with countries other than the United States or not at all.

United States v. *E. C. Knight Co.*, 156 U. S. 1.
In re Greene, 52 Fed. R. 104.
Chesapeake & Ohio Fuel Co. v. *United States*, 115 Fed. R. p. 623.
Coe v. *Errol*, 116 U. S. 517.
Kidd v. *Pearson*, 128 U. S. 1.
Dudley v. *Briggs*, 141 Mass. 582.

If mere intention to engage in international commerce in bananas could make the growing of bananas interstate commerce, so as to give to the grower a right of action for threefold the damage to his crop against one destroying it in order to prevent it from being used in such commerce, then we might have the following situation presented. Upon the destruction of a crop of bananas in Costa Rica the right of action for threefold damages would have accrued in favor of the grower. After such right of action had accrued, *but while he was out of the country and ignorant of his loss,* the grower altered his intention and determined not to transport his bananas to the United States. Nevertheless, he would have a right of action for threefold damages because the bananas, when destroyed, were intended by him to become the subject of commerce between Costa Rica and the United States.

That the intention of the parties cannot make illegal under the Sherman law acts which, except for such intention, would not fall under its prohibitions, is a rule supported by the authorities already cited.

B. The complaint does not allege any combination forbidden by the Sherman Act.

The case has been presented thus far on the assumption that the complaint alleges that the defendant had entered into some combination in violation of the Sherman Act. If the arguments already presented are sustained, it is unnecessary to consider whether this assumption is correct. Should the Court for any reason desire to consider this question, we submit that the complaint does not allege any combination which the Sherman Act forbids.

(*a*) The alleged purchases of the property and business of competing individuals and companies (par. 7) were neither contracts or combinations in restraint of trade

nor combinations to monopolize trade, even if, as alleged, they were made "for the purpose of controlling and monopolizing the trade of importing bananas . . . and to regulate the prices . . . and to prevent competition."

By an amendment, paragraph 17*a*, the purchase of "a controlling interest in the stock" of six or seven competing companies is alleged. (This interest may have been *all the shares* for anything that appears.) The purchase of the shares is an ordinary way of purchasing the property and business, and it comes to the same thing, with the additional advantage of the existing corporate organization for carrying on the business.

The Sherman Act does not prohibit the purchase by one company of the property and business, or shares, of other companies or persons, whether they compete with it or not.

Davis v. *A. Booth & Co.* (1904), 131 Fed. R. 31 (C. C. A.).

U. S. v. *E. C. Knight Co.*, 156 U. S. p. 16.

"There is a clear distinction . . . between the aggregation of properties *by purchase*, when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination." (Severens, J., in *Davis* v. *A. Booth & Co.*, 131 Fed. R. 37, where the A. Booth & Co. corporation had acquired the property and business of another corporation with covenants by the shareholders in the latter not to engage in the same business.)

"Congress did not attempt thereby to assert the power . . . to limit and restrict the rights of corporations . . . in the acquisition, control or disposition of property" (Fuller, C. J., in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 16).

In the *Northern Securities Case*, 193 U. S. pp. 353, 362,

both Harlan and Brewer, JJ., apparently assume that the purchase by one corporation of a majority of the shares in other corporations is not a violation of the act, and say that there was no such transaction in that case, but instead of it there was a combination of shareholders in two railway companies by which the shares were placed in the hands of a company organized for the purpose as a mere instrumentality for combining the two railway companies under one control. There is nothing of that kind in the present case.

The Sherman Act was not intended to prevent persons or corporations from acquiring property or business to the utmost extent to which they could do so. "The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can" (by Lord Hannen in the *Mogul Steamship Co.'s Case* [1892], A. C. p. 58). There is no limit placed upon his doing so either by competition or purchase.

An individual or a corporation does not *monopolize* trade by buying the property and business of others or by acquiring a great part or the whole of the trade of a particular kind, if there is no exclusion or control of others. It is not the extent of one's own property or trade, but the exclusion or control of others, that constitutes monopoly.

National Cotton Oil Co. v. *Texas*, 197 U. S. 115, 129.

The allegation of a purpose of monopolizing trade and to regulate prices and to prevent competition does not help the plaintiff's case. If the purchases made by the defendant did not constitute monopoly or restraint of trade, an intention thereby to monopolize or restrain trade would not make them do so.

"It is to be remembered in this connection that it is *the effect* of the contract upon interstate commerce, *not*

the intention of the parties in entering into it, which determines whether it falls within the prohibition of the statute" (Day, J., in *Chesapeake and Ohio Fuel Co.* v. *U. S.*, 115 Fed. R. 623).

"The true test would seem to be, not what the agreement professes, but what it accomplishes" (Gilbert, J., in *Gibbs* v. *McNeeley*, 118 Fed. R. 126).

The intention does not make a monopoly, and, if the acts of the defendant are not themselves a violation of the law, no amount of intention can give them that character. The allegations are really inconsistent, for they amount to saying that the defendant did something that in point of law did not constitute a monopoly, and did it with a purpose of thereby constituting a monopoly. That is not within the statute.

When a person or corporation buys out the business of a rival, or when two rivals unite their separate businesses in a single partnership or corporation, the purpose always is to get rid of the competition previously existing between them. But the transaction does not necessarily constitute a restraint of trade or a monopoly (see *Cincinnati Packet Co.* v. *Bay*, 200 U. S. pp. 184, 185).

The exacting of an agreement, as a condition of the purchases, that the sellers should not further engage in the trade (par. 8), did not affect the validity of the transactions. Such agreements have been held to be only an incident of the purchase, intended to secure to the purchaser the benefit of what he had bought, and are not necessarily violations of the Sherman Act.

Cincinnati Packet Co. v. *Bay*, 200 U. S. 179, 185.
Davis v. *A. Booth & Co.*, 131 Fed. R. p. 38.

There is also no suggestion of any damage that the plaintiff has sustained by reason of any of these purchases or agreements.

(*b*) The alleged contracts in 1899 and subsequent years (pars. 9, 10) between the defendant and other companies for the regulation of their trade and prices so as to prevent competition between them, if such contracts were made, were violations of the Sherman Act. But it does not appear that they were made for any period that was continuing after the plaintiff company was formed or began to do business, or that they have been in force at any such time or that the plaintiff was injured by them.

The supposed contracts alleged in paragraph 12 are not stated with sufficient definiteness to show whether they are contrary to the act or not. If the plaintiff cannot prove any more than is alleged, there is no violation of the act.

The second contract alleged in paragraph 14–15 to have been made in December, 1899, between the defendant's representative and McConnell and the other shareholders in the Camors-McConnell Co. for the purposes of restricting importations by the parties to it and regulating the prices at which they should sell and buy for ten years, would have been a violation of the act. The other contract of the 27th January, 1900 (par. 16), between the Camors-McConnell Co. and the Fruit Dispatch Co., by which the latter was appointed the exclusive selling agent of the former, was not contrary to the act.

It is alleged (par. 18) that by means of these contracts the defendant has maintained the prices of bananas in the United States at an excessive and unreasonable point and restrained trade in them and increased the price paid by the consumers.

But it is not pretended that the *plaintiff* thereby sus-

tained any damages. The plaintiff was not a *consumer*, and never bought any bananas in the United States at the high prices supposed to have been maintained, or intended to buy any there, whether the price was high or low.

The plaintiff was organized for the purpose of engaging in the business of buying and growing bananas in the Republics of Central America and importing them into the United States (*Rec.*, p. 6) and, if it had imported any, the high prices would have been an advantage to it, for the plaintiff would have been able to sell its bananas at the high prices or to get away the defendant's trade by underselling.

(*c*) There was nothing contrary to the act in entering upon "an active and destructive competition" with Camors, McConnell & Co. and others, or in carrying on "an economic warfare" against other companies and the plaintiff, as alleged in paragraphs 13 and 20. The act does not prohibit competition, or provide that it shall not be active and destructive, or that it shall be carried only so far as not to interfere with the business of competitors (see *Thomsen* v. *Union Castle Steamship Co.*, 149 *Fed. R.* p. 935, *and on appeal*, 166 *Fed. R.* 251 (No. 2). The only loss alleged is that sustained by Camors, McConnell & Co., and with that the plaintiff has no concern.

(*d*) The formation of the Camors-McConnell Co. to take over the business of Camors, McConnell & Co., upon the terms that the defendant should have one more than half of the shares, was not contrary to anything in the act. The defendant might have bought the whole business outright, as shown on page 16 (*a*), and then it would have had all the shares. The case is no worse on account of McConnell and the others taking nearly half, and being allowed to elect two out of the five directors (par. 14).

It is alleged (par. 13) that the defendant proposed an agreement which would make the business of that firm a part of "*said* combination." But the only agreements that were made regarding any combination were those mentioned above on pages 19, 20 under (*b*), by which the plaintiff was not affected.

(*e*) As to the concession, alleged (par. 19) to have been obtained in Panama, "in violation of the statute of the United States," granting to the defendant "exclusive shipping privileges" in two districts favorable to the cultivation of bananas, there is no law of the United States interfering with the defendant's obtaining such concessions in a foreign country. It was like the acquisition of the exclusive right to a piece of land or other property. The plaintiff might have obtained concessions of similar exclusive rights in other, and perhaps in the same, districts. The concession that was granted was obtained by the defendant for itself, and not in pursuance of any of the contracts mentioned. It does not appear that the plaintiff incurred any damage by reason of it. If Gadocan was in the Sixola district, it would seem that the plaintiff was violating the law of Panama as well as that of Costa Rica by the proceedings stated in par. 27.

(*f*) The purchase of the title acquired by Jose Astua Aguilar to the plaintiff's plantation and other lands in 1904 (par. 28, 29) was not contrary to anything contained in the act. The defendant had as good a right as the plaintiff to acquire a title to the land. If the Astua title was a good one, the plaintiff has no right to the plantation it claims. If the title was bad, the acquisition of it did the plaintiff no harm. In any event, nothing has been done under the title and the plaintiff has sustained no damage on account of it. The title was not acquired under any

of the agreements to regulate the prices of bananas in the United States.

The allegations in paragraph 34 of the complaint have already been dealt with.

Both therefore because the acts alleged were not forbidden by the Sherman Law and because the damages which the plaintiff alleges were not caused by those acts no case is stated under the Sherman Law.

III.

The plaintiff cannot recover any damages on the ground that the defendant by outbidding it, buying plantations, and making long contracts with growers destroyed "the market for the sale of bananas by the growers to the exporters in the West Indies, Central and South America."

a. Neither the Sherman Act nor any other law prevents a citizen from buying plantations, outbidding other buyers, or making contracts, whether long or short, for the purchase of goods. Any person has a right to do either of these things, and they are customary methods of carrying on business. Auctions would be impossible if men could not outbid each other. The acts charged are all steps in that *competition* which the Sherman Act was passed to promote.

United States v. *Trans-Missouri Freight Association*, 166 U. S. p. 337.

United States v. *Joint Traffic Association*, 171 U. S. p. 576.

It is not pretended that there was any contract between the defendant and other purchasers limiting the right of any of them to sell in the West Indies or in Central or

South America at such prices as they thought proper. It is not denied that the plaintiff could have bought bananas there, if it had been willing to pay as much for them as the defendant, and the only reason given for the plaintiff's not doing so is that the prices were so high "as to make it impossible for them to buy at a profit."

b. No statute of the United States can regulate trade in a foreign country. The power of Congress extends only to the regulation of commerce "among the several states or with foreign nations." Trade within the limits of a state is beyond its jurisdiction, and *a fortiori* must this be true of trade wholly in a foreign country.

> *United States* v. *E. C. Knight Co.*, 156 U. S. 1.
> *Hopkins* v. *United States*, 171 U. S. 578, 592 to 594.
> *Addyston Pipe Co.* v. *United States*, 175 U. S. p. 247.

It is well settled that commerce between states or between the United States and a foreign country does not begin until "the actual commencement of its transfer."

In re Greene, 52 Fed. Rep. 104, Judge Jackson said:—

> "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. . . . Neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitute that interstate commerce which comes within the regulating power of congress."

And in *U. S.* v. *E. C. Knight Co.*, 156 U. S., the Supreme Court said (p. 13),—

"The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

Articles manufactured and articles grown within the limits of a state must in this respect stand alike. Agriculture and commerce are as distinct as manufacture and commerce.

In *Chesapeake and Ohio Fuel Co.* v. *United States*, 115 Fed., at page 623, Judge Day said,—

"It is to be remembered in this connection that it is the effect of the contract upon interstate commerce, not the intention of the parties in entering into it, which determines whether it falls within the prohibition of the statute."

In *Coe* v. *Errol*, 116 U. S. 517, p. 525, the Supreme Court of the United States answered in the negative the following question:—

"Do the owner's state of mind in relation to the goods—that is, his intent to export them, and his partial preparation to do so—exempt them from taxation?"

In *Kidd* v. *Pearson*, 128 U. S., at page 22, the Court points out how futile it would be to admit "the secret and changeable intention of the producer in each and every act of production" to make that interstate commerce which otherwise would not be such commerce.

To the same effect, see *Trans-Missouri Case*, 166 U. S. 290, at pages 326, 327, 337, 341.

Purchases of bananas or banana plantations or contracts for the purchase of either made in the West Indies or in any other foreign country are not made illegal by any law of the United States, because they are not made

in the course of commerce between this country and foreign nations.

Moreover, the complaint seems to aver that all these contracts were made in some foreign country and so not subject to our law. Certainly, it does not allege the contrary. A combination or conspiracy to regulate prices at which bananas could be bought in a foreign country is not prohibited by the Sherman Anti-trust Law.

c. Finally, it is to be observed that the complaint does not allege that the plaintiff ever actually entered the markets of Central America to buy, or ever attempted to buy any bananas there. It does not even appear that the plaintiff was ever engaged in the business of buying bananas anywhere, or of obtaining them for exportation otherwise than by raising them upon its plantation. The plaintiff contents itself with merely alleging a monopoly of the Central and South American and West Indian markets by the defendant, which presumably antedated the plaintiff's activities, but which, it claims, would have precluded the plaintiff from buying if it had so desired. If mere desire or intention to enter a certain field of commerce, without any actual attempt to engage therein, gives a cause of action for damages against some one who happens to have violated the Anti-trust Act in any way, any man may recover damages against the Standard Oil Company by bringing suit and alleging that it has monopolized the oil markets and thereby prevented him from buying oil and selling same at a profit which otherwise he would have done.

It cannot be said that the defendant's alleged act of monopolizing the markets for export in Central America had any direct effect on the plaintiff's business or property, or actually restrained commerce between Central America and the United States so far as the plaintiff was concerned,

when such commerce existed only in an unexecuted intention.

See Opinion Court of Appeals, Rec. pp. 106, 107.

IV.

The damages claimed by the plaintiff are too remote and speculative to be recovered.

a. In so far as concerns that part of the damages alleged to have been occasioned by acts of Costa Rica, consisting of loss of profits which the plaintiff might have made on the sales of bananas grown on its own plantations, it may be said that the complaint in this respect does not show that any legal damage has been actually sustained, but, in any event, the damages alleged on this account are too remote and speculative to be recoverable in the circumstances and on the facts set forth in the complaint. The only damages that are suggested are the loss of profits which are too uncertain to be considered as damages, depending upon whether the plaintiff ever engaged in exporting bananas, whether it could have grown its bananas at a reasonable cost, whether it could have found a market for them in the United States, whether it could have obtained in competition with the defendant and others in the same business sufficiently high prices for them to have produced a profit, and upon so many other contingencies and unknown conditions that it would be impossible for the court and jury to say whether the plaintiff had been actually deprived of any profit or not. There is no criterion by which to determine whether the plaintiff would have made a profit or a loss, because the plaintiff had no established business in the importation and sale of bananas. It had never engaged in such business, and the only possible way by which even a guess

could be made whether its business would have been profitable or unprofitable would be the results of somebody else's business, which is clearly an inadmissible method of proof.

Central Coal Co. v. *Hartman*, 111 Fed. 96.
Sedgwick, Damages, 8th ed., ss. 183, 197.
Loder v. *Jayne*, 142 Fed. 1010.
Dudley v. *Briggs*, 141 Mass. 582.

(*b.*) The damages claimed by reason of the inability to buy in other markets are even more speculative and uncertain, depending on whether the plaintiff bought any bananas, what quantities, in what market, at what price, and at what price it sold.

V.

The plaintiff cannot recover on the ground that the defendant was a party to a conspiracy.

The plaintiff in the Court below claimed that the defendant is liable by reason of a conspiracy, as if the conspiracy itself was a distinct cause of action. The answer to this argument is found in the language used by the Supreme Court of the United States:—

> "To enable the plaintiffs to sustain an action on the case like the present it must be shown that the defendants have done some wrong, that is, have violated some right of theirs, and that damage has resulted as a direct and proximate consequence from the commission of that wrong. The action cannot be sustained, because there has been a conspiracy or combination to do injurious acts. In *Savile* v. *Roberts*, 1 Lord R. 374, Lord HOLT said, 'it was objected at the bar against these old cases that they were grounded upon a conspiracy which is of an odious nature, and, therefore, sufficient ground for an action by itself.' But to this

objection he answered 'that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution.' . . . It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive."

Adler v. *Fenton*, 24 How. 407, p. 410.

VI.

Unless the complaint states a case under the Sherman Act, the decision of the Court of Appeals is final.

The jurisdiction of the Circuit Court would then depend on the citizenship of the parties, and the Court of Appeals Act 1891, s. 6 (26 *Sts.* 828), provides that "the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

If a case were stated under the Sherman Act, the Circuit Court would also have jurisdiction under the express provisions of s. 7 of the act (*printed* 156 *U. S.* 8; 26 *Sts.* 210).

But, if it does not appear that the jurisdiction could be asserted on that ground, then the jurisdiction is dependent entirely upon the diversity of citizenship of the parties, and the decision of the Court of Appeals is final.

Rouse v. *Letcher*, 156 U. S. pp. 49–50.
Ayres v. *Polsdorfer*, 187 U. S. 585.

No mention of the Sherman Act is made in the complaint, and, if the facts therein stated do not constitute a

cause of action under that statute, then the jurisdiction rests wholly upon the diversity of citizenship.

It is not then a case in which jurisdiction is placed upon two grounds; *e.g.*, upon diverse citizenship and the fact that one of the parties is a United States corporation, as in *Union Pacific Ry. Co.* v. *Harris*, 158 U. S. 326, or upon a revenue law and the constitutionality of an act of Congress, as in *Spreckels Sugar Co.* v. *McClain*, 192 U. S. 397. In these cases the two grounds of jurisdiction existed. But in the present case, if there is no jurisdiction under the Sherman Act, then none remains but the diverse citizenship.

HENRY W. TAFT.
WALKER B. SPENCER.
J. L. THORNDIKE.
MOORFIELD STOREY.

No. 7645.

UNITED STATES OF AMERICA.

[Coat of Arms.]

DEPARTMENT OF STATE.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I CERTIFY That the document hereto annexed is a true copy from the records of this Department.*

IN TESTIMONY WHEREOF, I, Elihu Root, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief Clerk of the said Department, at the City of Washington, this 29 day of Feb., 1908.

ELIHU ROOT,
Secretary of State.
By W. T. CARR,
Chief Clerk.

*For the contents of the annexed document the Department assumes no responsibility.

DEPARTMENT OF STATE,
WASHINGTON, April 16, 1906.

CHARLES E. MAGOON, ESQUIRE, etc., etc., etc.,
Panama.

SIR:

The Department has again taken up the complaint of H. L. McConnell and the American Banana Company

against the Government of Costa Rica, and given it most careful attention. As a result of such consideration, the following telegram was sent you on March 19 last:

> "It appears on an examination of the pending treaty, that if that treaty is ratified, the warehouses and sites of the proposed piers of American citizens will be within the territory of Panama. The companies claim title by what they allege to be a valid location under the laws of Colombia before the separation of Panama. We should deem it a violation of the rights of the American possessors of this property to interfere with their possession and enjoyment except upon the judgment of a court, and we must insist that the officers of Costa Rica have no more right to do this than would the officers of Panama."

While some of the details of the case are involved in controversy, the Department would invite your attention to three considerations which appear to be beyond dispute, and which, in the present aspect of the situation, the Department regards as of fundamental, if not of controlling, importance.

The first of these is that under the Loubet decision of 1900, accepted as final by both Colombia and Costa Rica, the territory included in the McConnell plantation was awarded to Colombia (now Panama), and became subject to the jurisdiction of that country. The second is that Mr. McConnell in 1903 entered upon a portion of these lands, planted a large area with banana trees, built houses, and started the construction of a tramway, expending large sums of money in his enterprise, and he alleges that his proceedings were based upon the authority of certain laws of Colombia relating to uncultivated lands. The third consideration is that the pending treaty of March 7, 1905, between Costa Rica and Panama, defining the boundary line between

those Republics, will, when drawn, include the McConnell concession within the jurisdiction of Panama.

The Department is not unmindful of the contention of Costa Rica that an understanding has existed between that State and Panama whereby the former has retained temporary possession and administrative control over the district, and pending the ratification of the treaty March 7, 1905, exercises police powers and other general attributes of *de facto* sovereignty within the territory. At the same time it is undeniable that the *de jure* sovereignty has been in Colombia and Panama since the Loubet award, accepted as it is by Panama and Costa Rica, so that either by virtue of that award or of the pending boundary treaty the territory will ultimately come under the jurisdiction of Panama. Meanwhile certain American citizens, acting upon the assurances of the authorities of Colombia and Panama, and in accordance with the laws of those States, have gone into this territory, expended large sums in developing it, and by virtue of such acts have acquired certain possessory rights thereunder and are entitled to protection therein. In the adjustment of any conflicting claims of title which may arise or have arisen it would be improper for this Department to interfere. But, on the other hand, after rights, possessory or otherwise in this property have been acquired in good faith by American citizens and have become vested in them, the Department is of the opinion that they should not be divested except by due process of law, by ejectment or other appropriate legal action.

In the Department's conception of this matter, Costa Rica exercises at present a temporary *de facto* sovereignty over the territory included in the McConnell concession, subject of *right* to be divested at any time at the will of Panama, but actually continuing until such time as the pending boundary treaty is ratified. She exercises the

powers of government that are necessary for the orderly administration of the district, but should not use this sovereignty in such a way as to impair the rights of the *de jure* sovereign of the territory. Her functions of government are limited by her tenure, which is of a temporary and precarious character. Her duty is to preserve the property, not to destroy it, and hand it over to her successor without the commission of any acts tending to impair the ultimate rights of the *de jure* owner. It is obvious, for instance, that it would have been an unwarranted exercise of sovereign power for Costa Rica to grant a concession to McConnell for the construction of his railroad beyond the termination of the *de facto* sovereignty of Costa Rica. In a word, Costa Rica stands in the position of a usufructuary entitled to the fruits and profits of the territory during the period of tenure, and it cannot be admitted that Costa Rica can in any way destroy or impair the substance of the usufruct. In like manner it is equally clear that the title to property rights in this territory since the Loubet award are determinable according to the laws of Colombia and Panama, and it follows that Costa Rica can rightfully exercise no jurisdiction within the territory which Panama could not exercise; and as Panama cannot rightfully deprive possessors of title properly acquired under Colombian laws which remained in force after the secession of Panama, without due process of law, it would be equally unjust for Costa Rica to attempt to do the same thing.

In considering the present connection of Panama with the territory in question, it would appear that that State has consented that Costa Rica continue as the *de facto* sovereign until the ratification of the treaty. If Panama should interfere and seek to exercise at present jurisdiction North of the Sixola River, this would be inconsistent with her recognition of Costa Rica's temporary sovereignty

in that district. In the view of the Department, as long as the latter government is the sovereign in possession, whatever attributes that accompany or attend possession should be conceded to her, including the right to control by taxation or otherwise importations, etc., at Gadocan. But the ultimate attributes of sovereignty belong to the ultimate owner, and for this reason it is proper that Panama should see to it that rights and titles which have accrued concerning lands within this area should not be prejudiced by the State having accidental and temporary jurisdiction. It is suggested that this result may be reached by discreet representations by Panama to Costa Rica, perhaps by remonstrance or otherwise, rather than by a physical attempt to assert such jurisdiction.

You are instructed to call the situation as above set forth, together with the views of the Department, to the attention of the Government to which you are accredited, and to say that this Government insists that the property of Mr. McConnell and those whom he represents be protected and preserved, without any destruction thereof, until such time as the ultimate rights of the parties may be passed upon by a court or courts of competent jurisdiction.

In this connection, however, it is proper to state that the Department disclaims any intention to interfere in this case to the prejudice of the rights of the United Fruit Company, or any other American interest already acquired in the territory immediately in question.

I am, Sir,

Your obedient servant,

ELIHU ROOT.

Office Supreme Court, U. S.
FILED.
MAR 15 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

AMERICAN BANANA COMPANY,
Plaintiff in Error,

vs.

UNITED FRUIT COMPANY,
Defendant in Error.

686.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO ADVANCE.

First.

The questions involved in this case are:

(1) Has a court of the United States jurisdiction to determine a controversy between two citizens of the United States, in which it is alleged by the plaintiff and admitted for the purposes of the case, that the defendant, in violation of a law of the United States, has procured a foreign power through its officers to destroy the property of the plaintiff, and prevent it from carrying on trade with the United States.

(2) Can the laws of the United States be evaded and in fact annulled by a combination between a citizen of the United States and a foreign power?

It would seem that these questions could admit of but one answer,—that the first should be answered in the affirmative and the second in the negative. Yet the Circuit Court of Appeals for the Second Circuit has answered both conversely, and has rendered judgment against the plaintiff. In doing this it relies on English authorities, which held that there is a certain sanctity annexed to an Act of State which no municipal court can review.

The plaintiff in error makes this answer to the decisions relied upon in the Court below:

1. The Constitution and Laws of the United States Must Control in a Federal Court.

The Constitution expressly provides that this Constitution and the Laws which shall be passed in pursuance thereof "*shall be the supreme law of the land.*" Whatever the English doctrine may be, the American doctrine is so plainly stated in these words that no language can make them more clear.

2. The Courts of the United States Have a More Extended Jurisdiction Than any English Court.

They are not purely municipal courts. They have jurisdiction to determine that an Act of Congress is unconstitutional and therefore void. They have jurisdiction of controversies between the States of the Union. They have jurisdiction of controversies between citizens of the United States, in all cases arising under the laws of the

United States. This jurisdiction is expressly given by the Constitution (Article III, sections 1 and 2), and by Acts of Congress in pursuance thereof. The judicial power of the United States shall extend to all cases arising under the laws of the United States. As Webster said in his reply to Hayne:

"This needs no construction. Here is a law, then, which is declared to be supreme; and here is a power established, which is to interpret that law."

In the English authorities it is expressly held that no English Court has so extensive jurisdiction. It was on that ground that those cases were decided.

3. It will be contended on the argument that the English decisions have been misconstrued by the Circuit Court of Appeals, and that the interference by the officials of Costa Rica, which was procured by the defendant was not an Act of State, for two reasons (A) The very definition of an Act of State assumes that it is the free and voluntary act of the authorities of the State. An act procured by a foreigner can never be an Act of State. It is the act of the foreigner. The officials of the State act only as his agents. (B) The acts in question here were wanton aggressions upon private property and had no political character whatever. Even in the English Courts they would not be construed as an Act of State.

It would not be appropriate to argue these propositions upon this motion. The statement of them shows that they are fundamental and relate to the nature of the government of the United

States and the organization of its Courts. Certainly the discussion of questions of this sort should have a preference in the Supreme Court of the United States.

Second.

Irrespective of the reasons thus adduced, we respectfully submit that the practice which prevails in many courts of giving a preference to arguments upon demurrers, may properly be applied here.

It appears from the record that the case was disposed of upon a motion to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This objection could just as well have been taken by demurrer. It was, however, reserved until the trial. Had it been taken by demurrer and had the rulings of the Court below been as they have been upon the motion, the case would now be in such a position upon the docket of this Court that it would have been reached in ordinary course.

The Court below held that the practice adopted by the defendant was permissible. It certainly was very unjust to the plaintiff and caused the Court great inconvenience. It ought therefore, not to be encouraged. The effective way to discourage it is to give to the plaintiff in error, under such circumstances, the same position upon the docket that it would have had, had a demurrer been interposed in the first instance.

Third.

Another reason for granting the motion is that the banana plantations of the plaintiff in error are perishable, and going to waste in the tropical district in which they are situated.

It appears on the record (page 25) that the plaintiff has been wholly deprived from the use of the plantations, and prevented from gathering and marketing its products.

In the nature of the case the longer the defendant's monopoly continues, the more difficult will it be for any competitor to make head against it.

Fourth.

The motion to advance should be granted.

EVERETT P. WHEELER,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
MAR 6 1909
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

AMERICAN BANANA COMPANY, Plaintiff-in-Error, *against* UNITED FRUIT COMPANY, Defendant-in-Error.	**October Term, 1908. No. 686.** **Motion to Advance.**

Comes now the plaintiff-in-error by its counsel, Everett P. Wheeler, in that behalf and moves the Court, on the record duly filed herein and on the annexed affidavit of Clarence Bishop Smith, to advance the hearing of the above entitled cause and to set the same for argument at some time during the present term of this Court, and to grant to the said plaintiff-in-error such other and further relief as it may be entitled to receive.

EVERETT P. WHEELER,
Counsel for Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES.

AMERICAN BANANA COMPANY,
Plaintiff-in-Error,

against

UNITED FRUIT COMPANY,
Defendant-in-Error.

October Term, 1908.
No. 686.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss.:

CLARENCE BISHOP SMITH, being duly sworn, deposes and says: I am a member of the firm of Wheeler, Cortis & Haight, attorneys and counsellors at law in the City of New York. The senior member of that firm is Mr. Everett P. Wheeler, who is the attorney in this Court for the plaintiff-in-error, and I have been associated with him in the case since said firm was retained by the plaintiff in 1905.

The action was brought in the Circuit Court of the United States for the Southern District of New York, September 13th, 1906. The defendant's answer was filed November 2nd, 1906. The issues joined by said answer came on to be tried before Hon. Charles M. Hough and a jury on the 2nd day of March, 1908, and on a motion made to dismiss the case upon the complaint, the judge before any testimony was presented to the jury, decided in favor of the defendant and granted said motion. Judgment of dismissal was entered and

was affirmed by the Circuit Court of Appeals for the Second Circuit. A writ of error to this Court has been sued out; the transcript of record has been filed and printed, and the cause is now No. 686 upon the docket.

The questions in the case involve the construction and application of the Constitution of the United States, and of the laws of the United States relating to the jurisdiction of the Circuit Courts of the United States, and also of the law of the United States approved July 2nd, 1890 entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." The ground on which the said Circuit Court of Appeals affirmed the judgment was that the acts of defendant, of which the plaintiff chiefly complains, were done by officials of the Republic of Costa Rica; that Costa Rica was entitled to immunity from an investigation of its sovereign acts by the Courts of the United States; that the validity of such acts could not be examined at all, directly or collaterally, by the Courts of any other State, and that, therefore, the defendant cannot be held responsible for procuring these acts to be done by the officials of Costa Rica. The following is a brief statement of the facts appearing upon the record:

1. The plaintiff since about June 18th, 1904, has been and is a corporation duly organized under the laws of the State of Alabama and a citizen of the State of Alabama. It was formed for the purpose of carrying on the business of buying and growing bananas in the Republics of Central America and importing them into the United States, and there selling them, and for carrying

on such other operations as might be incidental to said business. The defendant was incorporated March 30th, 1899, as a corporation under the laws of the State of New Jersey, and was and is a citizen of that State. Ever since its incorporation it has been engaged in buying and growing bananas and importing them into various ports of the United States from the West Indies and Central America and South America, and selling them in the United States.

2. Shortly after its incorporation, the defendant combined with divers persons, citizens of the United States, to destroy the market which existed formerly in the West Indies and Central and South America, for the sale of bananas by the growers to exporters, and to monopolize the trade in bananas between the West Indies and Central America and South America and the United States of America, and to regulate and control the prices at which bananas should be sold in the United States; and defendant has by divers illegal methods destroyed the market for the purchase of bananas in the West Indies and Central and South America, and has succeeded in driving large numbers of its competitors out of business, and has increased the price of bananas in the United States above what, under the operation of the natural laws of trade, would have been the market price of bananas in the principal markets of the United States, and has obtained for itself such increased price for the bananas it has had to sell, and has established in its own interest a substantially complete monopoly of the trade in bananas between the West Indies and Central America and South America and the United States.

3. On September 11th, 1900, the President of the French Republic, as arbitrator under a treaty between the United States of Colombia and the Republic of Costa Rica, (by the terms of which treaty the decision of said arbitrator was to be final, and to serve as a complete and binding treaty between the contracting parties,) determined the boundary line between the said United States of Colombia and the said Republic of Costa Rica. Said line is hereafter styled the Loubet Line. Thereafter and in November, 1903, the Department of Panama, which was the part of the United States of Colombia adjoining said Republic of Costa Rica, declared its independence from the United States of Colombia, and adopted said Loubet Line as the boundary between it and Costa Rica, and its constitution which was promulgated February 15th, 1904, declared said Line to be the northern and eastern boundary of the Republic of Panama. By treaty between the United States of America and said Republic of Panama, duly ratified in February, 1904, the independence of the Republic of Panama was guaranteed by the United States.

4. The plaintiff shortly after its organization, and in June, 1904, became the lawful owner of certain lands, a certain railroad concession, and a railroad and pier in process of construction, which lands were on both banks of the Sixola River in said Republic of Panama, and already produced bananas. Plaintiff entered into possession of the same; and continued the development thereof, and the construction of said railway from said plantation to the port of Gadocan, and the building of said pier at said port.

5. In July, 1904, plaintiff was in peaceable and undisturbed possession of its banana plantation and was building its railway and pier as under the laws of the Republic of Panama it had the right to do, and would have been, but for the unlawful acts hereinafter mentioned, ready to commence the shipment of bananas from said plantation to the United States of America during the autumn of 1904. Said shipment would have been in competition with the defendant. Said plantation and railway were within the territorial limits of said Republic as fixed by its Constitution. Nevertheless, in said month of July, 1904, Costa Rican soldiers and officials were instigated and induced by said defendant company, to seize, and they did in fact seize, in violation of the sovereignty of Panama and of the treaty aforesaid, the portion of the plantation of the plaintiff herein lying on the northerly side of the Sixola River, which flowed through said plantation, and the banana plants thereon, and a cargo of railroad and other supplies, which had been landed from a vessel chartered for the plaintiff—the steamship *Ora*,—under the superintendence of Panama Customs officials. The defendant induced said soldiers and officials to hold, and they held said goods so landed, and occupied said northerly portion of the plantation of the plaintiff down to the commencement of this suit. Defendant also induced said officers to stop, and they have stopped, the construction and operation of the said plantation, railway, and the piers at said port of Gadocan, which afforded the only practicable mode of ingress to or egress from the said plantation, being the only port to which the plaintiff could bring supplies, or from which it could export the bananas grown

on any part of said plantation. They have prevented the importation of supplies for said plantation and railway and the exportation of bananas therefrom, and held said goods and plantation down to the commencement of the suit and prevented the plaintiff from carrying on the trade of exporting bananas and other tropical fruits from said plantation and district to the United States of America. The land to the south of said plantation and between it and the port of Bocas del Toro in the Republic of Panama, is crossed by large rivers, and is in large part a dense swamp and jungle, and part of it belongs to defendant, so that the construction of a railway through it from plaintiff's said plantation to said Bocas is and always has been impracticable. Defendant thereby prevented the plaintiff from carrying on its said business and broke up and destroyed the same.

6. The defendant, also as part of the combination aforesaid, and in order to prevent the plaintiff from buying bananas from other producers, by divers illegal means destroyed the market for the sale of bananas by growers of bananas to exporters, which market existed formerly in the West Indies and Central America, and defendant obtained a monopoly thereof, and in consequence thereof the plaintiff was unable to purchase bananas from the producers thereof for the purposes of its business aforesaid.

The first application made by the plaintiff for relief against the unlawful acts complained of was made to the Department of State of the United States. On the 16th day of April, 1906, the Secretary of State sent a dispatch to the United

States Minister at Panama, which dispatch was called to the attention of said Court and of the said Court of Appeals by both parties. This dispatch contains the following paragraphs at the conclusion thereof:

"You are instructed to call the situation as above set forth, together with the views of the Department, to the attention of the Government to which you are accredited, and to say that this Government insists that the property of Mr. McConnell and those whom he represents be protected and preserved, without any destruction thereof, until such time as the ultimate rights of the parties may be passed upon by a court or courts of competent jurisdiction.

"In this connection, however, it is proper to state that the Department disclaims any intention to interfere in this case to the prejudice of the rights of the United Fruit Company, or any other American interest already acquired in the territory immediately in question."

In view of the statement thus made by the State Department that the rights of the parties should be passed upon by a court or courts of competent jurisdiction, the action aforesaid was begun in the Circuit Court of the United States.

On behalf of the plaintiff I respectfully submit to this Court that the question whether it is competent for an American citizen, in direct violation of the laws of this country, to inflict an injury upon any American citizen in a foreign country through the instrumentality of officials of that foreign government, and without the possibility of redress in an American Court, is one of the first importance.

The Republics of Central America are numerous. Those in particular to the south of the Re-

public of Mexico have a comparatively small population, and their respective revenue is very much less than that of many corporations and individuals in the United States. For example—it appears from the annual report of the defendant for 1907 that its net income for the year ending Sept. 30, 1907, was $6,289,908.85. It appears from the official report for 1906 of the Secretary of State of Costa Rica that its net income for that year was only 4,648,515,51 colones, or about half that sum in American currency. It appears from the depositions taken herein that the railways in said Republic of Costa Rica between its capital and the Atlantic Coast are all owned and operated by the defendant herein, or by other American corporations, the stock of which is entirely owned by defendant. All the mails go over these lines. It appears from the official returns from the Republic of Costa Rica and from the evidence in this case that the larger part of the exports and imports from the ports of that Republic and the Carribean Sea are carried by the defendant. The telegraph service is in the hands of the defendant. Plaintiff fully expects to prove upon the trial that the influence of the defendant in that Republic is controlling.

An extract from an official report of the Imperial Consulate of Germany in Costa Rica is appended hereto, which confirms this proposition.

I respectfully submit that it is of the highest public importance that it should be determined by this Court, at the earliest possible day, whether or not an American citizen, in order to carry out a design which is in violation of the laws of the United States, can avail himself with impunity of the services of the officials of a foreign

state, which is entirely subservient to that American citizen.

Apart from these facts of public importance, I respectfully draw attention to the delays which have taken place already in the progress of this case.

It appears from the record that the plaintiff is the owner of a banana plantation in the Republic of Panama, and that the defendant has ousted plaintiff from the possession of this plantation, and that the plaintiff is entirely deprived of the profits therefrom. It is alleged in the complaint, and for the purposes of this motion the complaint must be taken to be true, that the defendant, with other companies with which it has combined, has a monopoly of the banana business in the United States, and has seized the plaintiff's plantation for the purpose of driving it out of business, and perpetuating said monopoly. This action is brought for the injury done to plaintiff up to the time of the commencement of this suit, and it is of the utmost importance to plaintiff that it should be, as soon as possible, allowed to continue its business, and be restored to the possession of its plantation.

The facts in the case are fully set forth in the complaint herein, and it would have been possible for the defendant to have raised every question, which has now been raised on the trial, by demurring to the complaint. The complaint was served on September 13th, 1906. The plaintiff was put to great expense in taking testimony in places outside of the State, in preparation for the trial. It spent six weeks in taking testimony in Panama and Costa Rica, and more than an additional month, altogether, in taking testimony in Mobile,

New Orleans, Jacksonville, Baltimore and Boston. Plaintiff was put to great expense in obtaining the above testimony, and in collecting its other witnesses at New York at the time of the trial, and preparing for the same. The plaintiff used the utmost diligence in obtaining as early a trial of the case as possible.

If the defendant had demurred to the complaint, argument could have been had thereon in 1906 or, at the latest, early in 1907. A writ of error could have been sued out, the case put upon the calendar of the Circuit Court of Appeals in 1907, and a determination had thereon, so that the record could have been filed in time to enable a hearing to be had at the present term of this Supreme Court.

Moreover, when judgment is rendered herein by this Court it will, if favorable to plaintiff, direct a trial at least as to the amount of damage sustained by plaintiff, which will involve still further delay.

The plaintiff ought not to be put in a worse position because of the delay of the defendant, which is naturally anxious to continue its monopoly as long as possible, and by putting off the decision of this case to prevent the plaintiff from carrying on the business of raising bananas and importing them into and selling them in the United States in competition with defendant.

CLARENCE BISHOP SMITH.

Sworn to before me this
27th day of February, 1909.

HARRY M. HEWITT,
Notary Public,
New York County.

(SEAL.)

THE UNITED FRUIT COMPANY.

(Translation of and extracts from "Berichte uber Handel und Industrie," March 6, 1906. From a report of the Imperial Consulate in San Jose, Costa Rica, to the German Government, referred to in foregoing affidavit of Clarence B. Smith.)

"The United Fruit Company controls not only almost the entire export of bananas to the United States, but has recently taken up exportation to England with success.

"In the year 1905 the company operated with a capital, in round numbers, of 84,000,000 marks. Of this amount, seventy-one and one-half million marks were in shares of stocks, on which 7%, that is to say, almost five million marks, dividends were paid. In addition to this the company owed ten and one-half million marks in 5% obligations, the interest on which amounted to 550,000 marks.

"The main business of the company consisted, as already noted, of the cultivation and exportation of bananas. In the fiscal year ending September 30, 1905, the company shipped 30,000,000 bunches to North America and England. If the selling price be reckoned at two marks per bunch, the total for bananas alone would be 60,000,000 marks a year.

[NOTE.—The values stated in the foregoing report are in marks. The annual report to the stockholders of the United Fruit Co. for the fiscal year ended September 30, 1905, states:

"Bananas.—The number of bunches of bananas handled by the company during the fiscal year reached a total of 30,296,709, including shipments to the United Kingdom. (At fifty cents per bunch

—a low price—this would make the company's gross income at least fifteen million dollars.)

* * * * * *

"Liabilities:
"Capital stock, $17,485,000.
"5% convertible bonds, $2,396,000."]

The Consular Report continues:

"As already repeatedly stated, Costa Rica is the headquarters of the company, and in it it has the most capital invested and represented in many branch lines. This position of the United Fruit Company in Costa Rica is the creation of one man, Minor C. Keith. The banana industry of Costa Rica and its development is due to him. He set the first plantation to work. He was manager of the Tropical Trading Company and later the vice president of the United Fruit Company. He carried his plans through with finished judgment, wide survey and iron energy. It would take us too far here to describe the gradual development of the company and follow the paths by which it has reached its present status. *It is sufficient to say that it has developed to-day in Costa Rica a mighty unassailable position as the uncontested lord of the land.* The relation of this giant trust to the little government is readily seen in the fact that the revenue of Costa Rica, in round numbers, is twelve million marks, over against which the receipts of this company for sales of bananas is about sixty million marks annually. The development of the United Fruit Company has operated on the economic life of the countries in the following ways:

"The entire export of bananas in Costa Rica is in the hands of the company. Not a single

bunch of bananas leaves the country without its assistance. It in part raises the bananas, in part secures them from independent planters, who are required to turn over to the company the entire yield at a fixed price.

* * * * * * *

"But the United Fruit Company controls not only the raising and exportation of bananas, but also controls the necessary means of transportation therefor. It is one of the principles of the great American trusts to make themselves as far as possible independent from the source of production to the close of consumption, and so bananas remain from their planting in Costa Rica to the point of entry in the United States in the hands of the United Fruit Company, or its dependent companies.

"The United Fruit Company in the year 1900 to 1902 built the Northern Railroad in order to thereby develop its banana estates. The old English Ferrocaril de Costa Rica, likewise controlling large banana properties, was interested. After a bitter contest the Northern Railroad finally leased in 1905 the entire line of the English company to San Jose and Alajuela, so that at the present time on the Atlantic side of the Republic there is only one railroad system, that of the United Fruit Company. The harbor of Limon, the only port of entry on the Atlantic coast, is in the hands of this company, and it controls piers belonging to the connecting lines of railroads. The Government has contracted not to grant any concessions for any other piers and would hardly be able to do so anyhow, as the harbor hardly offers sufficient room.

"It is hardly necessary to state that the control of the water transportation is bound up with this. All the vessels of transportation to the United States and a part of those to England, that is to say, approximately three-quarters of the entire means of transportation are in the service of the company. The transportation from Limon is the creation of the United Fruit Company * * *

"The entire postal service of Costa Rica with the United States and Europe is taken care of by the United Fruit Company. Mail comes and goes once weekly by way of New Orleans or Mobile on the banana ships of the company and it goes a farther distance on the Atlas steamers to New York with the bananas destined for that market.

* * * * * * *

"The company plays an important role in the importation of the country as it carries on its own business, for the needs of its employees, that approximately calls for one-tenth of the total imports of Costa Rica. More important yet is the fact that more than half of all the important goods coming into the country come in the ships of this company. That the United States has secured imports in a greatly preponderating measure over all other countries together is due in no slight degree to the frequent, convenient and fast transportation connections with America that the banana ships afford. The goods transported by this company, bananas, oranges and cattle, are even now a half of the total exports of the country * * *."

SUPREME COURT OF THE UNITED STATES.

AMERICAN BANANA COMPANY, Plaintiff in Error, *against* UNITED FRUIT COMPANY, Defendant in Error.	October Term, 1908. No. 686.

Sirs:—Take notice that the plaintiff in error in the above entitled action will, on Monday, the fifteenth day of March, 1909, at the opening of Court, or as soon thereafter as counsel can be heard, submit to this Court for its decision thereon the motion and affidavit of which the foregoing are a copy.

EVERETT P. WHEELER,
Counsel for Plaintiff in Error,
21 State Street,
New York City.

To MOORFIELD STOREY, Esq.,
HENRY W. TAFT, Esq.,
WALKER B. SPENCER, Esq.,
Counsel for Defendant in Error.

Office Supreme Court, U. S.
FILED.
MAR 13 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

AMERICAN BANANA COMPANY,
Plaintiff in Error,

AGAINST

UNITED FRUIT COMPANY,
Defendant in Error.

No. 686.

Answer of defendant in error to the motion of the plaintiff in error to advance the hearing of this cause.

This is solely an action at law for damages for alleged injury to property. It does not involve the title to or right of possession of land or the right of the plaintiff to commence, continue or resume business. In our judgment there is no reason why the motion to advance the hearing should be granted, but we do not object if the Court is willing to advance.

We suppose that the motion must be dealt with upon the record and we do not, therefore, reply to the affidavit of Clarence Bishop Smith; but we think the Court should be advised that the affidavit contains statements of alleged facts which do not appear in the record and could not have been proven at the trial, and that it very unfairly and untruly states the case. We think it enough in reply to refer the Court to the statement of the case in the opinion of the Court below, which appears in the record at page 105 thereof, and to the record itself which is brief.

Respectfully submitted,

MOORFIELD STOREY,
HENRY W. TAFT,
WALKER B. SPENCER,
Counsel for the Defendant in Error.